No. 94-749-CSX
Status: GRANTED

Docketed:
October 24, 1994

Title: John J. Hurley and South Boston Allied War Veterans Council, Petitioners
v.
Irish-American Gay, Lesbian and Bisexual Group of Boston, etc., et al.

Court: Supreme Judicial Court of Massachusetts

Counsel for petitioner: Darling,Chester

Counsel for respondent: Bonauto,Mary L., Van Ness,Gretchen, Ward,John

Ptn due & mld 10-24-94, see ml label re dkt dt. 40 reprinted copies ptn rcd 10-31-94, original set returned.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Mar 15 1994 | D | Application (A93-761) for a stay of the orders of the Supreme Judicial Court of the Comm of MA and the Superior Court pending certiorari, submitted to Justice Souter. |
| 2 | Mar 15 1994 | | Application (A93-761) denied by Justice Souter. |
| 3 | Oct 24 1994 | G | Petition for writ of certiorari filed. |
| 4 | Nov 23 1994 | | Brief of respondent Irish-American Gay, Lesbian and Bisexual Group of Boston in opposition filed. |
| 5 | Nov 30 1994 | | DISTRIBUTED. January 6, 1995 (Page 2) |
| 17 | Jan 6 1995 | | Petition GRANTED. |
| | | | ********** |
| 7 | Jan 26 1995 | | Suggestion of mootness filed by respondent. |
| 8 | Feb 1 1995 | | REDISTRIBUTED. February 17, 1995 (Page 46) |
| 9 | Feb 2 1995 | | SET FOR ARGUMENT TUESDAY, APRIL 25, 1995. (1ST CASE). |
| 10 | Feb 3 1995 | | LODGING BY PETITIONERS. Two copies of Memorandum and Order, C. A. No. 94-11402MLW, South Boston Allied War Veterans Council, et al. v. City of Boston, et al. (January 17, 1995, Judge Mark L. Wolf, United States District Court for the District of Massachusetts) |
| 12 | Feb 6 1995 | | Brief of petitioner in response to suggestion of mootness filed. |
| 14 | Feb 9 1995 | X | Brief of respondent concerning mootness filed. |
| 16 | Feb 21 1995 | | Respondents' suggestion of mootness REJECTED. |
| 18 | Feb 21 1995 | | Brief amicus curiae of Boy Scouts of America filed. |
| 19 | Feb 21 1995 | | Brief amicus curiae of Catholic War Veterans of the United States of America, Inc. filed. |
| 20 | Feb 21 1995 | | Brief amici curiae of Christian Legal Society, et al. filed. VIDED. |
| 21 | Feb 21 1995 | | Brief amici curiae of Center for Individual Rights, et al. filed. |
| 22 | Feb 21 1995 | | Brief of petitioners John Hurley, et al. filed. |
| 23 | Feb 21 1995 | | Joint appendix filed. |
| 24 | Feb 21 1995 | G | Motion of American Civil Liberties Union for leave to file a brief as amicus curiae filed. |
| 25 | Feb 24 1995 | | CIRCULATED. |

No. 94-749-CSX

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 26 | Feb 27 1995 | | Record filed. |
| | | * | Original record proceedings Supreme Judicial Court of Massachusetts and Suffolk Superior Court (BOX). |
| 27 | Mar 6 1995 | | Motion of American Civil Liberties Union for leave to file a brief as amicus curiae GRANTED. |
| 29 | Mar 6 1995 | | Order extending time to file brief of respondent on the merits until March 31, 1995. |
| 31 | Mar 29 1995 | D | Motion of Individual Rights Foundation for leave to file a brief as amicus curiae, out of time, filed. |
| 32 | Mar 31 1995 | | Brief of respondents Irish-American Gay, et al. filed. |
| 33 | Mar 31 1995 | X | Brief amici curiae of Anti-Defamation League, et al. filed. |
| 34 | Mar 31 1995 | X | Brief amici curiae of Irish Lesbian and Gay Organization, et al. filed. |
| 36 | Apr 14 1995 | X | Reply brief of petitioners filed. |
| 35 | Apr 17 1995 | | Motion of Individual Rights Foundation for leave to file a brief as amicus curiae, out of time, DENIED. |
| 37 | Apr 24 1995 | | Record filed. |
| | | * | Original Suffolk Superior Court trial exhibits. (BOX) |
| 38 | Apr 25 1995 | | ARGUED. |

Supreme Court, U.S.
FILED

94 749 OCT 24 1994

OFFICE OF THE CLERK

No.

# IN THE
# Supreme Court of the United States

October Term, 1994

JOHN J. HURLEY, INDIVIDUALLY AND THE SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,
PETITIONERS,

*v.*

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, AN UNINCORPORATED ASSOCIATION BY AND THROUGH TIMOTHY DALEY, BARBRA KAY, AND CATHLEEN FINN, ACTING ON THEIR OWN BEHALF AND ON BEHALF OF MEMBERS OF THE ASSOCIATION,
RESPONDENTS.

ON A PETITION FOR WRIT OF CERTIORARI
TO SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS.

## PETITION FOR WRIT OF CERTIORARI.

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## QUESTIONS PRESENTED FOR REVIEW.

I. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts violated the First and Fourteenth Amendment rights of the Petitioners when it compelled the Petitioners to include, in their privately organized Parade, a message the Petitioners deemed unwanted and antithetical?

II. Whether Petitioners' refusal to include a gay, lesbian and bisexual message within a private parade can be declared unlawful discrimination by the government without violating the Petitioners' First and Fourteenth Amendment rights as guaranteed by the United States Constitution?

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No.

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RESPONDENTS.

ON A PETITION FOR WRIT OF CERTIORARI
TO SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS.

## PETITION FOR WRIT OF CERTIORARI.

Petitioners, John J. Hurley and the South Boston Allied War Veterans Council, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts entered on March 11, 1994.

## Opinions Below.

The Opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts in *Irish-American Gay, Lesbian and Bisexual Group of Boston & others* v. *City of Boston*, SJC-06498 (July 11, 1994), is attached hereto in the Appendix C to the Petition for Writ of Certiorari (C 1). The Opinion and Judgment of the Superior Court of the Commonwealth of Massachusetts, *Irish-American Gay, Lesbian and Bisexual Group of Boston* v. *City of Boston*, South Boston Allied War Veterans Council, and John J. Hurley, Superior Court Civil Action No. 92-1518, (December 24, 1993) is attached hereto in the Appendix B to the Petition for Writ of Certiorari (B 1).

## Jurisdiction.

On March 11, 1994, the Supreme Judicial Court of the Commonwealth of Massachusetts affirmed the Judgment and Order of the Superior Court, dated December 24, 1993. See Appendices C and B, respectively. A Petition for Rehearing, after extensions of time granted by the Supreme Judicial Court, was timely filed and was denied on July 26, 1994. See Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

## Constitutional Provisions Involved.

This case involves portions of the First and Fourteenth Amendments to the Constitution:

"Congress shall make no law . . . abridging the freedom of speech . . . "

U.S. Constitution, Amendment I.

"Nor shall any state deprive any person of life, liberty, or property without due process of law . . . "
U.S. Constitution, Amendment XIV, § 1.

## Statutes Involved.

The statute involved is Massachusetts General Law chapter 272, sections 92A and 98. M.G.L. c. 272 §§ 92A and 98.

## Statement of the Case.

On November 15, 1993, Respondent, Gay, Lesbian, & Bisexual Group of Boston (GLIB) sued the Respondent, City of Boston, and Petitioner, Allied War Veterans Council of South Boston (Veterans) and John J. Hurley, individually alleging (a) that the Petitioners had lawfully excluded GLIB from the 1992 and 1993 St. Patrick's/Evacuation Day Parades in South Boston, in violation of Massachusetts penal statute G.L. c. 272, §§ 92A & 98, the First and Fourteenth Amendments to the U.S. Constitution, and articles 1 and 16 of the Massachusetts Declaration of Rights; and (b) that the Veterans were state actors, and thus, GLIB's exclusions constituted state action under the Fourteenth Amendment and violative of GLIB's First Amendment rights. The Veterans argued that theirs was a privately funded, permitted parade, protected by the First and Fourteenth Amendments to the U.S. Constitution, and fully reflective of their traditional religious and social values.

The Federal question regarding the First and Fourteenth Amendments was raised by the Veterans in the trial court. "The Veterans argue that their Parade is a form of speech protected by the First Amendment via the Fourteenth Amend-

ment, and that their speech will be effectively diluted or distorted if they are required to include GLIB in their Parade." Appendix B at B23. The Veterans cross claimed against the City for unlawful interference with their Parade.

On December 15, 1993, the Superior Court issued its findings of Fact, Rulings of Law, and Order of Judgment. The court found no state action and dismissed all claims against the City. Since the Petitioners were private actors, the court dismissed GLIB's First and Fourteenth Amendment claims against the Petitioners. The court found the Veterans' privately-funded, permitted parade to have no expressive purpose, to be a public event, a place of public accommodation and an open recreational event, and that the Veterans discriminated against GLIB on the basis of values and messages, i.e. sexual orientation.

After an analysis of the content of the Parade and a review of the participants, the trial court found it "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment." Appendix B at B25. The court further found that "the Veterans' right of expressive association is not unduly burdened by the statute's (M.G.L. c. 272) restriction." Appendix B at B25. The Veterans were permanently ordered and enjoined: a) from discrimination against GLIB on the basis of sexual orientation with respect to participation in the Veterans' annual St. Patrick's Day/ Evacuation Day Parade; and b) to accomodate in the Parade in all respects representatives of GLIB on the terms and conditions generally applicable to all other parade participants.

On March 11, 1994, a majority of the Justices of the Supreme Judicial Court of Massachusetts affirmed the Judgment of the Superior Court dated December 24, 1993. (SJC No. 94-64948) Appendix C.

The Federal question regarding the claim of infringement of the Veterans' First and Fourteenth Amendments rights was again presented and considered by the Supreme Judicial Court

on appeal. The S.J.C., applying the standard of whether the findings below were "clearly erroneous", upheld the lower court's ruling that the parade was not a protected expression under the U.S. Constitution. "[T]here was no error in [the trial court's] finding that the parade was not used by the Council for expressive purposes, and that, as a result the [Veterans] could not cloak their discriminatory acts in the mantle of the First Amendment." Appendix C at C15, 16.

A dissenting opinion in the case held the parade to be protected speech, and found the trial judge's findings to be an unconstitutional, content-based classification of the speech. Appendix C at C21. The dissent further found the order of the trial court to be a "flagrant violation of the Veterans Council's First Amendment rights." Appendix C at C26.

An application to the Supreme Judicial Court of Massachusetts, was made on May 13, 1994, for Motion to Enlarge Time for Filing the Veterans' Petition for Rehearing and allowed on May 16, 1994. On July 11, 1994, the written decision of the Supreme Judicial Court of the Commonwealth of Massachusetts was issued. *Irish-American Gay Group of Boston* v. *Boston*, 418 Mass 238. (1994) Appendix C.

On July 26, 1994, the Supreme Judicial Court for the Commonwealth of Massachusetts considered and denied the Veterans' Petition for Rehearing. Appendix D at D1.

## Reasons for Granting the Writ.

In an astounding decision which conflicts with the well settled law and doctrines of this Court, the Massachusetts courts have abdicated their duty to preserve and to protect the guarantees of its citizens' First Amendment rights, and the liberty interests and due process of law mandated by the Fourteenth Amendment to the United States Constitution. The Su-

preme Judicial Court of Massachusetts (SJC), in affirming the judgment of the trial court, ruled that: (1) a privately sponsored parade was not speech protected by the First Amendment; (2) a parade which reflected the organizers' "traditional religious and social values" was a parade without "any specific expressive purpose" (Appendix C at C6 and C13, respectively); and (3) the trial court's evaluation of the content of a parade organized by a private sponsor was merely an examination to determine if speech was involved at all. Appendix C at C16 n.20.

The affront to the First Amendment, which is now law in Massachusetts, is so great in its abridgment of the Petitioners' speech, that it resulted in the Petitioners cancelling their 1994 parade rather than showcasing a message they deemed offensive and antithetical. The dissent wrote:

> "That the judge's decision and order requiring the Veterans Council to allow GLIB to march and to express itself as a group is a flagrant violation of the Veterans Council's rights is an unavoidable conclusion . . . Our holding today, while, to some, seemingly pushes us forward, really pushes us back over 200 years, to an era that lacked the protection guaranteed by the First Amendment." Appendix C at C26.

In asking this Court to grant certiorari and reverse the decision of the SJC, the Petitioners point not only to the effect a denial of certiorari will have on their First Amendment protections now and in the future, but note the effect a denial will have on First Amendment expressions elsewhere.

I. THE HIGHEST COURT IN MASSACHUSETTS HAS UNCONSTITUTIONALLY ABRIDGED THE VETERANS' RIGHTS OF FREE SPEECH GUARANTEED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. *This Parade was speech protected by the First and Fourteenth Amendments.*

> A parade is, by its nature, a pristine form of speech. *See, Perry Educ. Assoc.* v. *Perry Local Educator's Assoc,* 460 US 37, 45, 103 S.Ct. 948, 954 (1983); *Shuttlesworth* v. *Birmingham,* 394 US 147, 152 S.Ct. 935, 939 (1969); *Cox* v. *Louisiana,* 379 US 536, 554-55, 85 S.Ct. 453, 4644-65 (1965); *Invisible Empire of the Knights of the KKK* v. *Mayor of Thurmont,* 700 F.Supp. 281, 286-87 (D.Md. 1988). In parades, people gather together for the purpose of expressing their message. *See, e.g., Id.* The public thoroughfares of our nation are the public fora in which the issues of the day can be debated and where individuals seek to engage in basic expressive activity, such as parading. *Ibid. Grayned* v. *City of Rockford,* 408 US 104, 115, 92 S.Ct. 2294, 2303 (1972) (citing Police Dept. of Chicago v. *Mosley,*48 US 92, 94-96 (1972)); *Hague* v. *C.I.O.,* 307 US 486, 515, 59 S.Ct. 954, 963 (1939). Every parade is designed to convey a message. *Ibid.* As such, a parade organized by a private sponsor is the quintessential exercise of the First Amendment right of freedom of expression. *Ibid.*

*New York County Board of Ancient Order of Hibernians* v. *Dinkins,* 814 F. Supp. 358, 366 (1993) Appendix A at A18.

In the Massachusetts decision, now before this Court, Justice Nolan wrote in dissent:

> Today will be regarded as a sad and frustrating day in the history of the First Amendment to the United States Constitution. Today, a majority of this court upholds, and thereby endorses, a trial judge's flagrant violation of the free speech rights of citizens of this Commonwealth . The majority acquiesces in a judge's order instructing a private group that if it wishes to express itself at all, it must include in its expression a particular idea, one with which the group does not agree. One must strain to recall or even to imagine such an obvious violation of the revered rights to free speech.

Appendix C at C17-C18.

The dissent noted that the Veterans raised the issue of free speech throughout the trial, in their memorandum and in their briefs on appeal. Appendix C at C6. The Veterans also stated that their parade was meant to "express traditional religious and social values." Appendix C at C19. The Massachusetts trial court dismissed speech on the grounds that "[g]iven the Veterans lack of selectivity in choosing participants and failure to circumscribe marchers' messages, it is impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment." Appendix B at B25.

The Veterans clearly articulated an expressive purpose for their parade to reflect "their traditional religious and social values." Appendix C at C6. Whether the Veterans achieved their expressive purpose, however, should have been determined by the Veterans, not the courts. "The First Amendment

mandates that we presume that speakers, not the government, know best both what they want to say and how they want to say it." *Riley* v. *National Federation of the Blind*, 487 US 781, 790-91 (1988). "The First Amendment protects the [Petitioners'] right not only to advocate their cause, but also to select what they believe to be the most effective means for so doing." *Meyer* v. *Grant*, 486 US 414, 424 (1988).

Contrary to the findings of the court, the Veterans were selective in who they allowed to march. Even the SJC acknowledged that: "Participants from previous parades are sent an application for the upcoming parade. Those who have not previously participated and who inquire about participation in the parade are sent applications . . . The council votes on applications for participation in 'batches', and the council does not generally inquire into the message or views of each applicant." Appendix C at C65. The SJC glossed over these facts, relying on the findings of the trial judge that anybody could virtually show up, pay a fee and march. Appendix C at C68 n.13. At trial, however, this finding was contradicted by testimony from various parties. It was noted that between 90 and 95% of all participants were repeat participants.[1] Trial transcripts at 245, 380. The Boston Police Department testified that the police would try to evict any person or group showing up and marching without the Veterans' permission.[2] In a parade

[1] Trial testimony of John J. Hurley, Trial Transcript page A-380:
"Q. But the fact is, would you agree, with Mr. Lyons when he testified that about 90% to 95% of the participants in the parade have marched before?
A. Yes, that's true."

[2] Trial testimony of Boston Police Superintendent Thomas P. Maloney, Trial Transcript page A-234:
"Q And if there is someone in a — let's confine ourselves to the 1992 parade, Superintendent. If a group jumped into the line of march, that was not listed on the roster, and was observed by yourself or your colleagues, what next would happen?
A. We probably would have consulted with the parade organizers to find out if they approved or concurred with this other group into the parade. If they did not, we would try to eject them from the parade route."

consisting of over 10,000 marchers, the trial court could not point to a single case where a person or group showed up, paid a fee and marched without the Veterans' permission. Indeed, the very fact that the parade was a permitted event meant that the Veterans, in satisfying the City's legitimate time, manner and place concerns, had to define the size of the parade before a permit was issued. This, coupled with the fact that a parade roster is printed weeks in advance of the parade, indicating who would be marching, renders the finding of an "open recreational event" ludicrous. Appendix B at B27. These findings are subject to review by the Supreme Court. *Jacobellis* v. *Ohio*,378 US 184, 190, and n. 6. (1963). In fact, under the standard laid down in *Jacobellis*, the SJC should have undertaken an independent review of the fact finding, as opposed to the application of the "clearly erroneous" test. Appendix C at 1298. *See also, New York Times* v. *Sullivan*, 376 US 254, 285 (1964); *First National Bank* v. *Bellotti*, 435 US 765, 787 (1978); *First National Bank* v. *Bellotti*, 371 Mass. 773, 793 (1976).

As for the finding that the Veterans did not circumscribe messages, the fact is that the Veterans excluded GLIB, ROAR (an anti-busing group), the KKK, and a truck displaying anti-gay signs, and also circumscribed the messages of the groups Mass Right to Life and NORAID (Northern Irish Aid). This exclusion and circumscription of messages was of "no legal relevance" to the SJC. Appendix C at 1296, n. 10. The Court erred in dismissing the relevance of these exclusions.[3]

As this Court has noted, marching and parading fall well within the sphere of conduct protected by the First Amendment.

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[3] *Gay Veterans Association* v. *American Legion*, 621 F.Supp. 1510 (S.D.N.Y. 1985) (The American Legion may exclude a group of gay veterans wishing to march under self-identifying banner as privately organized parade does not become a state actor merely because it celebrates a state holiday, Veterans Day.) (*aff'd* by the Second Circuit orally from the bench Nov. 8, 1985, without written decision). *See KKK* v. *Mayor of Thurmont*, *infra* at 289.

*Gregory* v. *Chicago*, 394 US 111, 112 (1969); *Shuttleworth* v. *Birmingham*, 394 US 449, 460 (1958). "[E]ntertainment as well as political and ideological speech, is protected . . . " *Schad* v. *Borough of Mt. Ephram*, 452 US 62, 65 (1981).

B. *The Courts of Massachusetts impermissibly examined, analyzed and evaluated the content of speech and expressive activity.*

The very fact-finding engaged in by the trial court was itself an impermissible and unconstitutional intrusion into the Veterans' parade and should have been reviewed by the SJC. *Jacobellis* v. *Ohio*, 378 US 184, 190, and n. 6 (1963).

(i) Content-evaluation and examination.

The government may not consider either content or subject matter of the speech. *Consolidated Edison Co. of N.Y.* v. *Public Service Comm'n*, 447 US 530, 536 (1980). "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Hudgens* v. *N.L.R.B.*, 424 US 507, 520 (1976).

The courts of Massachusetts impermissibly extended this Court's doctrine of time, place and manner regulation by citing *Clark* v. *Community for Creative Non-Violence*, 468 US 288, 293, n. 5 (1984), as standing for the proposition that: "In order to rely on the protections of the First Amendment for speech or expressive association, the defendants initially had to demonstrate that the parade truly was an exercise of those First Amendment rights (citation omitted). This, the judge found, they did not do." Appendix C at C14. Of course, *Clark* did not stand for this proposition. When this Court in *Clark* wrote that "it is the obligation of the person desiring to engage in assertedly

expressive conduct to demonstrate that the First Amendment even applies," this Court was not referring to a clearly expressive activity such as a parade, but rather was referring to questionably expressive activities such as camping and sleeping. *Clark, supra*. The question was whether a rule prohibiting sleeping and camping in an area of a public park impermissibly infringed on the message of the demonstrators who asserted that sleeping and camping overnight were integral to their speech. This Court said the regulation was "clearly [a limitation] on the manner in which the demonstration could be carried out." *Clark* at 294. A time, place and manner restriciton is only valid if it is content neutral, narrowly tailored to serve a significant governmental interest, and leaves open adequate alternative channels for speech. *Id*. at 293. Nowhere in *Clark* did this Court seek to determine whether the organizers of the demonstration shared common views, or whether the participants were close personal friends, or mere interested strangers. Yet, this is what the Massachusetts courts did in this case. The Massachusetts courts also cited *U.S.* v. *O'Brien*, 88 S.Ct. 1673 (1968), to support *Clark*, (Appendix C at C16, n.20), but in *U.S.* v. *O'Brien*, this Court assumed that burning a draft registration card was expressive conduct, whereas the Massachusetts courts said the Veterans parade was neither speech nor expressive conduct.

In answering the Veterans' argument that the trial court impermissibly evaluated content, the SJC noted that the trial judge merely "examined whether there existed speech or any other activity protected by the First Amendment." Appendix C at C16 n. 20. The trial judge went much further. He not only examined the relationship of the parade organizers to the participants, but also examined the relationship of the participants to each other, going so far as to speculate about the motives and viewpoints of the participants in the parade. Appendix B at B24. The trial judge concluded: "A proper celebration of

St. Patrick's and Evacuation Day **requires** diversity and inclusiveness." Appendix B at B24 (Emphasis supplied). "Diversity **should** be the hallmark of their parade." (Emphasis supplied) Appendix B at B28. The SJC dissent characterized this last statement as a "crude regulation of the content." Appendix C at C26.

The SJC improperly endorsed the examination of the content, organization and viewpoints in the Petitioners' 1993 Parade. The trial court, for its part, simply ignored the Veterans' freedom of speech claims. The denial of federal rights by a state requires an independent examination by this Court of the whole record, as the judgment constitutes a forbidden intrusion of free expression. *See New York Times* v. *Sullivan*, 376 US 254, 285 (1964); *Jacobellis* v. *Ohio*, 378 US 184 (1963). This is especially so, when the examination is based on an analysis founded on errors of fact, surmise, conjecture and speculation. *E.g.*, Appendix C at C12, n.13 and C25 n.4.

The trial judge conducted an inappropriate appraisal of the facts, and formed an opinion relating to the content of the Petitioners' parade, *see*, *Forsyth County* v. *Nat. Movement*, 112 S.Ct. 2395 (1992); *Boos* v. *Barry*, 485 US 312, 334 (1988).

(ii) The SJC and Expressive Association.

Although the Veterans repeatedly raised their free speech rights, Appendix C at C4, and repeatedly argued that their Parade was their expression, their speech, Appendix C at C19, n.1, and C4, the trial court reduced the Veterans' claims to one of expressive association:

> The Veteran Council contends that it may lawfully exclude GLIB because neither the public accommodations statute nor the 14th Amendment applies to its Parade. The Veterans argue that the Fourteenth Amendment is irrelevant because there is no state

> action; and the statute is inapplicable because the Parade is not a place of public accommodation, and because application of it would be an impermissible infringement of the Veterans' constitutional right of expressive association.

Appendix B at B2.

"It is this right [expressive association] that the Veterans claim would be unconstitutionally burdened by application of the public accommodation statute." Appendix B at B23. The trial court egregiously ignored the Veterans' freedom of speech claims.

The trial court also mischaracterized the expressive association running the Parade. It was uncontroverted that the Veterans Council is an expressive association. The trial court, however, viewed the parade itself as an association comprised of parade participants and parade organizers.

> Where, however, the association consists of '[s]trangers to one another . . . and [the association] admits all who are willing to pay the admission fee, . . . such a coming together to engage in [a] recreational [activity] . . . is not protected by the First Amendment.' *Dallas* v. *Stranglin*, 490 US 19, 26, (1989). In the instant case, the parade is more akin to a 'social association.' *See Dallas, supra*. Participation in the parade is not limited on the basis of similarity of viewpoints.

Appendix B at B24.

Unless the trial and Supreme Judicial Court believed that the Allied War Veterans Council was itself a group of strangers to one another coming together in a parade with no expressive

purpose, who else but participants and organizers could the courts have been referring.

The trial court cited *Dallas* v. *Stranglin* to make the point that the parade was a social, nonexpressive association. In citing *Dallas*, the Massachusetts trial court stretched its reasoning to embrace the facts of a dance hall case, and to apply those facts to a parade. In contrast, in a parade case with virtually identical facts, *AOH* v. *Dinkins*, the court explicitly declined to reach the issue of expressive association, and instead decided that case solely on freedom of speech.[4]

The Allied War Veterans Council clearly articulated a message. Appendix C at C6 and C19. Yet, the trial court and the SJC noted that the parade was more akin to a "social association". Appendix B at B29. The Court also noted that the Parade was comprised of diverse groups espousing a myriad of themes. Appendix B at B7 and B24. The Court stated "[c]ontact between the Veterans and the various participants is casual, often occurring at best, a few times a year . . . no argument has been made that the Veterans share a personal aspect of their lives with the various participating groups." Appendix B at B23 at n.26. Beyond a doubt, the trial court and the SJC erred in defining the expressive association as parade organizers and their invited participants.

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[4] In *AOH* v. *Dinkins*, federal judge Duffy distinguished the AOH parade from the Veterans' parade, as the latter had been described by Massachusetts Judge Zobel. Zobel, in February of 1993, described the Veterans as mere "custodians of a civic celebration" and the Veterans' 1992 parade as requiring "detailed participation by City agencies in planning and execution." Appendix A at A23. Judge Zobel identified the issue just prior to the March 1993 parade as follows: "Defendants want a 'traditional parade' expressing their 'values'. They regard Plaintiffs' views as antithetical to those values and to the ethnic-religious component of the parade. Thus, allowing Plaintiffs to participate in the parade would impermissibly conflict with Defendants' rights of expression under the federal and Massachusetts Constitutions." Zobel Order of February 19, 1993. In December of 1993, however, Massachusetts trial judge Flannery ruled that the Veterans privately ran and organized the parade (Appendix B at B1 and B22), that the Veterans were not state actors, and that there was no state action involved in the parade other than the usual and customary public safety and sanitation services. Appendix B at B10, B22.

Because the trial court and the SJC applied membership cases to the parade, *Concord Rod & Gun Club* v. *MCAD*, 402 Mass. 716, 720, 524 N.E.2d 1364 (1988), *Directors of Rotary Int'l* v. *U.S. Jaycees*, 468 U.S. 609, 617 (1984), the courts improperly drew the inference that the parade was a membership organization. It is not. It is the Veterans' expressive activity – their speech. "A parade is, by its nature, a pristine form of speech." Appendix A at A18. The error of the SJC's affirmation can be found in the words of the majority in *Roberts* . . "On its face, the Minnesota Act does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria. Nor does the Jaycees contend that the Act has been applied in this case for the purpose of hampering the organizations' ability to express its views . . ." *Roberts* at 623-34 (citations omitted). In this case, the Veterans argued repeatedly that their parade was their speech, and that forcing the Veterans to carry a message they found objectionable was unconstitutional. Just as selective exclusion from a public forum by the state may not be based on content, *Chicago Police Dept.* v. *Mosley*, 408 US 92 (1972), neither may a citizen be compelled to express the ideological views of the state. *Wooley* v. *Maynard*, 430 US 705, 717 (1977).

(iii) No discrimination found.

The trial court found that: "The defendants' final position was that GLIB would be excluded because of its values and messages, *i.e.* its members' sexual orientation." Appendix B at B4 n.5. The trial judge confused a group's message with the group's members sexual orientation. The fact is, the Veterans never inquired into participants' sexual preferences. The Dissent made this point forcefully:

> "There is no evidence in the record that the Veterans Council ever inquired into the sexual preference of any person intending to march in the parade, including members of GLIB; there is no evidence that the Veterans Council ever excluded any homosexual or bisexual; there is evidence in the record that the Veterans Council would let the members of GLIB march without a banner identifying the group." Appendix C at C25.

(iv) State Action.

"[T]he action of the state courts and judicial officers in their official capacities is to be regarded as action by the state." *Shelley* v. *Kraemer*, 341 US 1, 14 (1948). The actions of the state courts in Massachusetts deserve no special consideration. The Supreme Judicial Court of Massachusetts, acting under color of state law, abridged the constitutionally protected rights of free speech being exercised by the Veterans in contravention of the First and Fourteenth Amendments to the United States Constitution.

C. *The State, in compelling the inclusion of an unwanted and antithetical message, violated the Veterans' First Amendment guarantee of freedom of speech.*

Once the SJC endorsed the trial court's examination of "whether there existed speech or any other activity protected by the First Amendment", Appendix C at C16, n.20, in the Veterans' parade, and upheld the trial court's impermissible determinination that there was none, the damage to the Veterans' free speech rights was completed. As the dissent noted, "[R]egardless of whether the parade has one message, ten messages, or no message at all, if GLIB's particular message

is not in the parade, it cannot constitutionally be forced on the Veterans Council. Thus, although an individual who drives his automobile may have no expressive purpose for doing so, the State cannot require him to foster a message while driving that he otherwise would not." Appendix C at C20 (citing *Wooley* v. *Maynard, supra.*) In *Sanders* v. *U.S.*, 518 F.Supp. 728, 730 (D.D.C. 1981), aff'd 679 F.2d (D.D.Cir. 1982), the federal court upheld the arrest of a single intruder on an event sponsored by another individual. In *Invisible Empire, KKK* v. *Mayor of Thurmont,* 700 F.Supp. 281, 287-88 (D.Md. 1988), the federal court ruled that the N.A.A.C.P. could not march in the KKK's parade. "The NAACP in this case is seeking more than attendance at the parade; they are seeking to take part in the KKK's speech itself by participating in the parade." This, the court said, was impermissible. Yet, that intrusion is precisely what the SJC affirmed in this case.

The Petitioners have a right to be free from government compulsion to adopt speech. As this case involves a privately funded and privately organized parade, the state cannot compel the Petitioners to subsidize a forum or speech by those with ideological messages rejected for inclusion by the organizers. *Abood* v. *Detroit Bd. of Education,* 431 US 209 (1977). The very purpose of the First Amendment is to foreclose public authorities from assuming a guardianship of the public mind. *Thomas* v. *Collins,* 323 US 516, 545 (1945).

## II. This Decision, If Not Reversed, Will Have Profound Effects Upon The Exercise Of First Amendment Rights, Not Only Within Massachusetts, But Within Other State And Federal Jurisdictions.

The SJC has ordered Petitioners to include in their parade a message which they view as antithetical to their theme. As Justice Nolan noted in dissent, "this court upholds, and thereby

endorses, a trial judge's flagrant violation of the free speech rights of citizens of this Commonwealth. The majority acquiesces in a judge's order instructing a private group that if it wishes to express itself at all, it must include in its expression a particular idea, one with which the group does not agree. One must strain to recall or to even imagine such an obvious violation of the revered right of free speech."
Appendix C at C18.

If the decision of the SJC is not reversed, then the government, through the simple expedient of declaring a private parade or demonstration a "public accommodation", can dilute, distort and contradict, by government order, the whole point of a privately organized and funded parade or demonstration. By the same token, the National Socialist Party could conceivably be ordered to be included, if they so desired, in a "Salute to Israel Parade"; the KKK in a private civil rights celebration honoring Martin Luther King; and Act-Up in a religious procession.

It is beyond dispute that the First Amendment rights of everyone requires that there be no forced mixing of messages. This kind of court-ordered homogenization of speech, the forced mixing of conflicting messages, is a ludicrous parody of our tradition of free speech. As Justice Nolan noted, "[t]he [trial] judge's crude regulation of the content of the Veterans Council's speech is epitomized by the last sentence of his decision: 'Inclusiveness should be the hallmark of the [Veterans Council's] parade.'" Appendix C at C26.

Such a result runs afoul of well-settled First Amendment law, as interpreted by this Court and by the Federal Circuit Courts of Appeal. "The right to use a public place for expressive activity may be restricted only for weighty reasons. Clearly, government has no power to restrict such activity because of its messages . . . For example, two parades cannot march on the same street simultaneously, and government may allow

only one." *Grayned* v. *City of Rockford*, 408 US 104, 115 (1972). Accord, *Sanders* v. *US*, 518 F.Supp. 728 (D.C.D.C. 1981), *aff'd without opinion*, 679 F.2d. 262 (D.C.Cir. 1982); *Redgrave* v. *BSO*, 855 F.2d. 888, 906 (1st Cir. 1988), *cert. denied*, 488 US 1043 (1980) ("We have been unable to find any case, involving the arts or otherwise, in which a state has been allowed to compel expression.")

The decision of the Supreme Judicial Court is not just an affront to the Allied War Veterans Council of South Boston or to the citizens of Massachusetts, rather it is an injury and affront to the First Amendment rights of citizens everywhere in our nation. This case and its result, the cancellation of the Veterans' St. Patrick's Day Parade in 1994, was widely covered by the media. For the courts to compel the Veterans to include in their traditionally-themed parade a group with an antithetical message is to bring us one step closer to the creation of state orthodoxy, where only politically correct speech is permissible. What the courts in Massachusetts have done is to separate multi-thematic, celebratory parades from narrowly-focused demonstrations, and to declare the former unprotected by the First Amendment.

Now, in Massachusetts, the sponsors of a parade may be exposed to criminal sanctions if their expression does not conform to what a trial judge or permitting authority deems to be a "proper", "focused", "properly sponsored" or "inclusive" parade. Such governmental control over speech is expressly forbidden by the First Amendment.

**Conclusion.**

Petitioners pray that certiorari should issue.

Respectfully submitted,

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# APPENDIX.

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# APPENDIX A.

NEW YORK COUNTY BOARD OF ANCIENT ORDER OF HIBERNIANS, Plaintiff,

*v.*

David N. DINKINS, individually and in his Capacity as Mayor of New York City; The City of New York, The Police Department of the City of New York, Raymond Kelly, as Police Commissioner of the City of New York, and St. Patrick's Day Parade Committee, Inc., Defendants.

No. 93 Civ. 0281 (KTD).

United States District Court,
S.D. New York.

Feb. 26, 1993.

Sponsor of St. Patricks Day parade brought action challenging city's decision to require sponsor to allow homosexual organization to march in parade as condition of parade permit. The District Court, Kevin Thomas Duffy, J., held that city violated sponsor's First Amendment free speech rights by ordering sponsor to allow homosexual organization to march in parade under its own banner.

Ordered accordingly.

**1. Constitutional Law 90.1(4)**

St. Patrick's Day parade sponsored by private organization was protected free speech under First Amendment. U.S.C.A. Const.Amend. 1.

**2. Constitutional Law 90.1(4)**

Parade organization by private sponsor is exercise of First Amendment right of freedom of expression. U.S.C.A. Const. Amend. 1.

**3. Constitutional Law 90.1(4)**

In exercising First Amendment right of free speech, message intended to be conveyed by parade sponsored by private organization is to be determined by parade sponsor and not by state or city. U.S.C.A. Const.Amend. 1.

**4. Constitutional Law 90.1(4)**

City violated First Amendment free speech rights of sponsor of St. Patrick's Day parade by ordering sponsor to allow homosexual organization to march in parade under its own banner. U.S:C.A. Const.Amend. 1.

**5. Constitutional Law 90.1(4).**

Municipality may constitutionally restrict right to use public streets, as it must exercise great deal of control over traffic regulation and public safety. U.S.C.A. Const.Amend. 1.

**6. Constitutional Law 90.1(4).**

Municipal restrictions on use of public streets may seek to regulate only time, place and manner of parade, so long as those restrictions are justified without reference to content of regulated speech, are narrowly tailored to serve significant governmental interest, and leave open ample alternative channels for communication of information. U.S.C.A. Const. Amend. 1.

**7. Constitutional Law 90(3)**

If government's purpose underlying regulation is justified without reference to content of regulated speech, then incidental infringement of First Amendment is constitutional, notwithstanding disparate impact. U.S.C.A. Const.Amend. 1

**8. Constitutional Law 91**

Implicit in right to engage in activities protected by First Amendment is corresponding right to associate with whomever one chooses; this freedom of association embraces concomitant right not to associate with whomever one chooses. U.S.C.A. Const.Amend. 1.

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O. Peter Sherwood, Corp. Counsel of the City of New York, New York City (Florence A. Hutner, Lorna B. Goodman, Asst. Corp. Counsels, of counsel), for defendants David N. Dinkins, The City of New York, The Police Dept. of the City of New York, and Raymond Kelly.

Gilroy Downes Horowitz & Goldstein, New York City (Lawrence C. Downes, of counsel), for defendant St. Patrick's Day Parade Committees, Inc.

Shearman & Sterling, New York City (R. Paul Wickes, Clare O'Brien, of counsel), for intervenors Irish Lesbian and Gay Organization.

New York Civil Liberties Union Foundation, New York City (Norman Siegel, Arthur N. Eisenberg, of counsel), for amicus curiae.

Burlingham Underwood, New York City (John G. Ingram, Philip A. Nemecek, of counsel), for amicus curiae St. Patrick's Society of Brooklyn, St. Patrick's Society of the Borough of

Queens, United Irish Counties Ass'n of New York, Inc. and The Grand Council of United Emerald Societies, Inc.

Wilmer, Cutler & Pickering, Washington, DC (Thomas Clark, Gary Born, of counsel), for amicus curiae Religious Coalition and Parade Coalition.

Putney, Twombly, Hall & Hirson, New York City (Norman Fassler, of counsel), for amicus curiae Religious Coalition and Parade Coalition.

Center for Constitutional Rights, New York City (Joan P. Gibbs, Suzanne L. Shende, of counsel), for amicus curiae.

MEMORANDUM & ORDER

KEVIN THOMAS DUFFY, District Judge:

This is one of those unusual cases where the issue presented by all counsel has remained constant and clear. It is the facts surrounding the issue that seem to be in a total state of flux.

Broadly stated, the issue is whether the City of New York ("City") can compel the Ancient Order of Hibernians ("AOH")[1], a private and long-standing sponsor of New York's St. Patrick's Day Parade, to alter the message that it wishes to convey in the Parade by requiring it to include, in the Parade and under their own banner, the Irish Lesbian and Gay Organization ("ILGO"), an organization whose tenets are allegedly inconsistent with the message of the Parade's sponsors.

At my request, counsel for the parties, prepared and filed an agreed statement of uncontested facts after I held a conference on Tuesday, February 2, 1993. I have adopted as many of these agreed upon facts as possible. I scheduled argument on Monday, February 22, 1993, and was apprised that certain facts had changed. At that hearing I advised the parties not to change the facts again. No matter what protestations of good

[1] AOH in this opinion will refer to the New York County Board of the AOH. The State and National AOH organizations will be referred to as "State AOH" or "National AOH."

will the parties offered on that date, the facts have changed once again.

Indeed, one of the most difficult tasks in this matter is to get a handle on the facts and the real position of the parties. At times it seemed that the attorneys were acting as navigators attempting to get a fix on their location while aboard a melting ice flow in the midst of a tempest. Counsel for the City, for example, argued at one point, that the City would be willing to permit, without conditions, the AOH to march in a parade on some city street other than Fifth Avenue on March 17th at 11:00 A.M. *See* City Defendants' Memorandum of Law In Opposition to Plaintiff's Motion for Summary Judgment and In Support of City Defendants' Cross-Motion for Summary Judgment ("City's Mem.") at 13; Hutner Affidavit ¶ 4 and Exh. A, dated Feb. 11, 1993. The City's latest position, however, is that the City would deny the AOH the Parade permit unless AOH "includes the Irish Lesbian and Gay Organization in the parade under its own banner." *See* Letter to this court from Corporation Counsel, dated Feb. 17, 1993.

At one point, over a year ago, the AOH argued to Judge Pierre Leval of this court that there was a waiting list of organizations who wanted to participate in the St. Patrick's Day Parade and that ILGO would have to wait its turn to be considered for inclusion in the Parade. Judge Leval denied relief to ILGO for various reasons including, in part, because he believed the AOH had a valid waiting list and ILGO could not jump in front of other organization applicants who precede it on the list. *ILGO* v. *N.Y. State Board of Ancient Order of Hibernians*, 788 F.Supp. 172, 179 (S.D.N.Y. 1992). Yet, it may well be that the "waiting list" was merely a sham and an "attempt to diffuse the situation," because the AOH has now stated that under no circumstances would they allow ILGO to march. Transcript, Argument held February 22, 1993 ("Tr.") at 7-8.

Within the last two weeks, ILGO protested to the state court that the dispute as presented there was moot. Yet, in argument to this court on February 22, 1993, ILGO took the position, without any change of facts, that this court should abstain in deference to the state court. Tr. at 59.

**Statement of Facts.**

The St. Patrick's Day Parade has been a fixture of the New York City scene for well over two hundred years. The first New York St. Patrick's Day Parade took place in 1762. The AOH has sponsored the Parade virtually every year out of the last one-hundred and fifty-three years, and in the years that the AOH has not conducted the Parade, an affiliated Hibernian group has done so. For over seventy years, the Parade has taken place on Fifth Avenue starting at 11:00 A.M. on the day of the Roman Catholic liturgical celebration of the feast day of St. Patrick. This day generally is March 17th, but the liturgical celebration is changed when March 17th falls on a Sunday.

The AOH is an organization comprised of Roman Catholic men of Irish descent who comply with the Roman Catholic rite's requirement that every adult must receive communion at least once during the Easter Season. The AOH has apparently set out other strictly religious requirements for membership. Every year, under the guidance of the AOH, each contingent that marches in the St. Patrick's Day Parade selects two delegates to be part of the "St. Patrick's Day Parade and Celebration Committee" ("Parade Committee"). This Parade Committee is responsible for taking care of the myriad details and arrangements inherent in running the Parade.

The AOH and the Parade Committee privately finance the Parade exclusively by means of private donations. The only public assistance received by AOH is for the police and sanitation services, which the City affords to every public gathering in the City.

The AOH, the Grand Marshal of the Parade, and members of the Parade Committee start the St. Patrick's Day celebration by attending mass at St. Patrick's Cathedral on Fifth Avenue. The Roman Catholic Archbishop of New York reviews the Parade from the steps of the Cathedral. Various units in the Parade carry banners depicting St. Patrick and other saints of the Roman Catholic Church. Notwithstanding this connection to the Roman Catholic Church, it is abundantly clear that some of the marchers participating in the St. Patrick's Day Parade are neither members of the AOH nor members of the Roman Catholic Church. Indeed, anyone who has watched the St. Patrick's Day Parade can attest to the fact that not everyone in the Parade is Irish, although at times it has been said that on St. Patrick's Day, everyone in New York is Irish. The Parade marchers generally number in the vicinity of 150,000, with between one and two million on-lookers. The New York St. Patrick's Day Parade is carried by at least one local television station and quite often parts of it are shown on national television.

The St. Patrick's Day Parade is billed as the largest annual civilian Parade in the world. The Parade celebrates, *inter alia*, freedom and Irish culture and heritage. Traditionally, elected officials have marched in the Parade regardless of their religious or political affiliation or of their position on any issue. Joint Statement of Uncontested Facts ("Jt.Stmt.") at ¶ 13.

The AOH has applied for and received a Parade permit from the New York City Police Department ("NYPD") authorizing it to conduct the St. Patrick's Day Parade on Fifth Avenue for more than seventy years. Jt.Stmt. at ¶ 9. The NYPD maintains a list of organizations that traditionally conduct annual Parades in the city and has, in the past, had the practice of granting permits to the organizations on that list. The AOH has been the organization on that list which conducts the St. Patrick's Day Parade. Jt.Stmt. at ¶ 10.

The AOH has adopted rules for the Parade to prevent any group or person from using the Parade as a vehicle or forum to pursue any political, social or commercial agenda inconsistent with the message, values and viewpoint of the AOH,[2] or whose purposes, principles or agenda are inconsistent with the teachings of the Roman Catholic Church. Jt.Stmt. at ¶ 12. It is the position of the AOH that the determination of whether a particular purpose, principle or agenda is inconsistent with the teachings of the Roman Catholic Church rests within the discretion of the AOH.

In October, 1990, ILGO requested that the Parade Committee allow it to march under its own banner as an affiliated unit in the 1991 Parade. The Parade Committee denied ILGO's request for various reasons. AOH now maintains that the denial of ILGO's request was occasioned by the AOH's "policy against the inclusion of groups advocating messages contrary to the parade sponsor's [message] and the Catholic Faith." Jt.Stmt. at ¶ 14.

Thereafter, the City administration urged the AOH to admit ILGO to the 1991 Parade. When AOH refused to do so, a compromise was struck whereby ILGO members were permitted to march in 1991, not as an affiliated unit, but as guests of a Hibernian unit. Mayor Dinkins marched with ILGO rather than at the head of the Parade, where the Mayor usually marches. Jt.Stmt. at ¶¶ 14, 15. All of the parties agree that the "1991 Parade experienced discord and unseemly interchanges between ILGO members and the Parade's audience." Jt.Stmt. at ¶ 16.

I cannot envision a Parade put on by any organization that would restrict its participants solely to those individuals who

[2] In the past, the AOH has excluded from the Parade a number of proposed contingents, including Robert Kennedy as a political office seeker; the Right-To-Life Organization; the Budweiser team of horses; etc. *See* Decision of Administrative Law Judge Maldonado, at 8, attached to the Hartnett Affidavit as Exh. 7.

have never sinned. Such a gathering surely would be quite small in number, and those who would hold themselves out as entitled to participate most likely would be hypocrites.

Statistically speaking (150,0009 marchers × 200 plus years), there seems to be little possibility that 1991 was the first year gays or lesbians marched in the St. Patrick's Day Parade. Indeed, it would appear that over the years the Parade participants surely included certain individuals whose sexual orientation would not meet with the public approval of the AOH and the Parade Committee. Whether the AOH and the Parade Committee knew of the sexual orientation of such participants at the time of those Parades, is unclear. The AOH maintains, however, that individual members of ILGO (and those marchers whose sexual orientation is different from that approved of by the AOH) are welcome to march in the Parade *without a banner* as guests of the various Parade contingents. Neither the City nor ILGO contest the good faith of this offer, nor is there any basis to doubt that it is the policy of the AOH and the Parade Committee. Indeed, it seems that where there have been organizations not permitted to march as identifiable organizations, their members have still been included in the Parade; *e.g.*, the Right-To-Life Organization.

I must conclude, therefore, that the true reason the AOH and the Parade Committee seek to exclude ILGO is because ILGO would insist on marching under a separate banner that would, in effect, identify the AOH as condoning sexual practices contrary to the message that the AOH believes the Parade should convey. Accordingly, I do not address the arguments regarding ILGO's exclusion on the basis of a waiting list or as a consequence of its behavior in the 1991 Parade.

With respect to the 1992 Parade, the Police Commissioner awarded the permit for the Parade to the State Branch of the Ancient Order of Hibernians ("State AOH"). This precipitated litigation in the state courts which eventually was settled with

the AOH conducting the Parade pursuant to the permit issued to the State AOH.

On January 23, 1992, the New York City Commission on Human Rights ("HRC") commenced a proceeding pursuant to the City Human Rights Law to compel compliance with ## 8-107(2) and 8-108.1 of the New York City Administrative Code. In that proceeding the HRC alleged that the AOH discriminated against ILGO because of the sexual orientation of that group's members. A cease and desist order was sought against the AOH, and a further order was sought from the HRC for the establishment and maintenance of a parade application system for the New York St. Patrick's Day Parade under the continuing supervision of a Commission Administrative Law Judge. On February 17, 1992, ILGO was permitted to intervene as a party in the HRC proceeding. Hearings were held on March 6th and 9th, 1992, before the Commission's Chief Administrative Law Judge Rosemarie Maldonado.

On March 13, 1992, the HRC Administrative Law Judge issued a recommended decision, the conclusions of which included: "(1) that the Parade was a public accommodation subject to the Human Rights Law; (2) that plaintiff had violated the Human Rights Law by excluding ILGO in 1991; and (3) that the application of the City Human Rights statute to the Parade would violate the First Amendment rights of the Parade sponsors." Jt.Stmt. at ¶ 18.

ILGO was not permitted to march as an affiliated unit in the 1992 Parade. However, apparently at the insistence of Mayor Dinkins, ILGO was permitted to hold its own demonstration from 60th Street to 66th Street on Fifth Avenue just prior to the Parade, and was given a special place on Fifth Avenue cordoned off by the police from which to "review" the Parade. Virtually every elected city official who normally marches in the AOH Parade, chose instead to march in ILGO's Parade. Although the Mayor was ill and could not march, "he

announced that, if he could, he would march in ILGO's Parade." Jt.Stmt. at ¶ 19.

On October 27, 1992 the City Human Rights Commission rendered a final decision and order. The Commission adopted its Administrative Law Judge's recommended decision and order with respect to the first two holdings thereof, but ruled that the application of the Human Rights Law would not violate the sponsor's First Amendment rights.

Specifically, the Commission held as follows:

> In order to prevail, Respondents [*i.e.*, AOH] must demonstrate that application of the Human Rights Law's prohibition against discrimination on the basis of sexual orientation to its Parade procedures would unconstitutionally infringe upon Respondents' rights of free speech, expressive association and free exercise as guaranteed by the First Amendment to the United States Constitution and/or by the New York State Constitution, Article 1, Sections 1, 3, 8 and 9. We find that Respondents have failed to make such a showing.
>
> Respondents argue that the Parade is a celebration of Irish Roman Catholic heritage. [(footnote omitted)]. They allege that among the unwritten requirements for inclusion in the Parade is that no group admitted have a political agenda or an agenda contrary to the teachings of the Roman Catholic Church. They argue that ILGO advocates the right to pursue a homosexual lifestyle and is thus in violation of Church doctrine.
>
> * * * * * *
>
> We disagree with the Administrative Law Judge's analysis that, under the *Roberts* test, the relief requested by Complainant cannot be granted. Rather, we find that under this test the relief requested by Complainant must be granted.

The characteristics of the Parade define the parameters of the First Amendment rights implicated. After examining the record below and reviewing the parties' comments, we find that the St. Patrick's Day Parade is a secular event which is a celebration of a broad range of values surrounding Irish heritage. In her Findings of Fact, the Administrative Law Judge found that the Parade celebrates secular, religious, cultural, historical, civic and numerous other aspects of Irish culture. . . . Respondents' associational right is thus the right to associate with persons who support the broad celebratory goals of the Parade rather than, as Respondents argue, the right to associate merely with those who adhere to any one element of Irish heritage, such as Catholicism.

* * * * * *

For the above reasons, Respondents' contention that the Parade represents symbolic speech of a type or character which would be unconstitutionally altered by the inclusion of ILGO is unpersuasive.

We hold that inclusion of ILGO would not impair Respondents' right of association. The fact that the Parade is sponsored by an Irish-Catholic organization does not change the analysis here. The right of association contemplates not merely the nature of the association, but the message conveyed or the ideas expressed by way of that association. *See Roberts* [v. *U.S.*] 468 U.S. 609 [104 S.Ct. 3244, 82 L.Ed.2d 462] [(1984)].

* * * * * *

In general, in like cases involving parades, the degree of exclusivity or diversity will be a factor to be considered. However, the fact that the organizers of a given parade open it to some does not necessarily mean that the state

> may require them to open it to all who express an interest in participating. Thus, we may envision a scenario, perhaps even in the St. Patrick's Day Parade, where exclusion would be appropriate. This would be determined, however, on a case-by-case basis. Where a parade organizer shows that its First Amendment interests take precedence, it will prevail on the second prong of the *Roberts* test. Respondents simply have not made this showing here.

*New York City Commission on Human Rights* v. *Ancient Order of Hibernians in America, Inc., et al.*, Case No.: MPA-0362 (Oct. 27, 1992) at 4-13, attached to Hartnett Affidavit at Exh. 8. (citations omitted).

It is interesting to note that in determining the question as to whether a parade can be a "public accommodation," neither the Administrative Law Judge nor the New York City Human Rights Commission makes any reference to a judicial or administrative opinion in a case involving parades. Apparently, the closest to a parade-type decision that the Administrative Law Judge and the Commission could find to support their determination that the Parade be regarded as a public accommodation is a case involving the New York City Marathon. *New York Roadrunners Club* v. *State Division of Human Rights*, 81 A.D.2d 519, 437 N.Y.S.2d 681 (1st Dep't 1981), *aff'd*, 55 N.Y.2d 122, 447 N.Y.S.2d 908, 432 N.E.2d 780 (1982).

An action was commenced in the Supreme Court of the State of New York, New York County, to review the decision of the City Human Rights Commission. In the same proceeding the Commission cross-petitioned for enforcement of its order. The case, entitled *Beirne* v. *New York City Commission on Human Rights*, was assigned to Justice Alice Schlesinger.

Meanwhile, on November 2, 1992, the AOH applied to the New York City Police Department for a parade permit allowing it to conduct the 1993 St. Patrick's Day Parade. Applications

for a permit were also filed by two other organizations; (i) the St. Patrick's Day Parade Committee, Inc. (this membership corporation is not to be confused with the Parade Committee mentioned above. It will be referred to henceforth as the "Corporate Committee"); and, (ii) the Brooklyn Night Court Emerald Society. This was the first time ever that three applications for the permit for the St. Patrick's Day Parade were submitted. Jt.Stmt. at ¶ 22.

On December 10, 1992, the Police Department, for the first time, required the applicants for the St. Patrick's Day Parade permit to submit information concerning their plans for the Parade, including the identity of all marching units. Jt.Stmt. at ¶ 23. Apparently all three of the applicants complied with this request.

The *Beirne* case was argued before Justice Schlesinger on January 5, 1993. She took the matter under submission, promising a decision during the week of January 18, 1993. Jt.Stmt. at ¶ 24. On January 8, 1993, the Police Commissioner of New York, Raymond Kelly, announced that he had awarded the permit for the St. Patrick's Day Parade to the Corporate Committee for the following reasons: "(1) that the views and practices of plaintiff [AOH] in excluding ILGO were inconsistent with the City's 'policy of inclusion'; (2) that the City Human Rights Commission had determined that 'the sponsors of the 1992 Parade, the Ancient Order of Hibernians, violated the City Human Rights Law by excluding' ILGO; and (3) that planning for the Parade needed to proceed expeditiously and could not await judicial review of the Commission decision in the *Beirne* case." Jt.Stmt. at ¶ 25.

Apparently the briefs in the *Beirne* case were filed on or about January 10, 1993. On January 11, 1993, Justice Schlesinger ruled:

> In light of the City's decision as to the Award of a permit to sponsor the 1993 St. Patrick's Day Parade to an organization other than the AOH, namely, the St. Patrick's Day

> Parade Committee, Inc., this court believes that the instant action, challenging an order of the Commission on Human Rights to the AOH that ILGO be given the opportunity to march in this year's Parade (*see* paragraph # 2 of the orders at page 16), is moote.

Order of Justice Schlesinger, attached to the Hartnett Affidavit at Exh. 20.

This left the AOH in a "Catch-22" position: the Police Commissioner would not issue a permit for the St. Patrick's Day Parade to the AOH unless the New York City Human Rights Commission order was judicially set aside; and, the New York State Courts refused to consider the order of the New York City Human Rights Commission unless the New York City Police Commissioner issued the permit to the AOH.

Accordingly, on January 15, 1993, the AOH started the instant action for injunctive relief under 42 U.S.C. § 1983 (the Civil Rights Act) and under the First and Fourteenth Amendments to the Constitution of the United States. Specifically, the AOH seeks to enjoin the City defendants from depriving the AOH of those rights by refusing to issue to AOH the permit to conduct the 1993 St. Patrick's Day Parade.

At a conference on February 2, 1993, I advised all of the parties that the AOH could move for temporary relief or for summary judgment (without the necessity of further formal notice) by filing its motion papers on or before February 5, 1993, with responsive papers due from the City on February 11, 1993 and any reply papers by February 16, 1993. The City was deemed to have filed a formal answer and a cross-motion for summary judgment. Accordingly, I requested the submission of a joint statement of uncontested facts. Thereafter, I permitted ILGO to appear as an intervening defendant in this case. Various *amicus curiae* requested permission to file briefs on behalf of one side or the other. All were permitted.

Originally, the Corporate Committee was a defendant in this matter. On February 11, 1993, the Corporate Committee returned to the City the St. Patrick's Day Parade permit that it had been issued. The City then solicited applications for a new permit to conduct the 1993 New York St. Patrick's Day Parade. The AOH filed the one and only timely application for the Parade permit.

On February 17, 1993, the City defendants, by their counsel, addressed the following letter to this court:

> Dear Judge Duffy:
>
> As we informed Your Honor in our letter of February 11, 1993, the facts underlying this case have changed as a result of the return of the permit granted to the St. Patrick's Day Parade Committee. Since we reopened the application process, the City received one application for a permit for the parade submitted by the Ancient Order of Hibernians.
>
> Today, the City defendants determined that they will not grant County AOH the permit it seeks because County AOH has announced that it will not comply with the order of the New York City Commission on Human Rights dated October 27, 1992 requiring County AOH to include the Irish Lesbian and Gay Organization in the parade under its own banner. Thus, the case is not neither moot nor premature as we stated last Thursday and we respectfully request that the Court render its decision.

Letter to this court from Corporation Counsel, dated February 17, 1993.

On Thursday, February 18, 1993, I advised all the parties that I would hold a hearing on Monday, February 22, 1993 to try to sort out the issues left for decision under the changed circumstances.

During this same period (the week of February 14, 1993) the AOH, the City, the ILGO had a conference in which they discussed whether they should request Justice Schlesinger of the State Court to reconsider her decision tht the matter before her had become moot. Apparently, a conference call was made to Justice Schlesinger during which counsel for ILGO insisted that nothing had changed and asserted that the action in the New York State Supreme Court continued to remain moot. Tr. at 59. Apparently, Justice Schlesinger accepted ILGO's argument and did not change her determination as to the mootness of the *Beirne* case.

On the morning of February 22, 1993 argument was held before this court for approximately two hours. Advance notice of this argument was well publicized in the media with stories of the forthcoming argument being carried by every major New York City newspaper, and most New York City radio and television stations. No other applications for the Parade permit were filed as of the time of the argument, nor did any other parties request intervention in this case.

At the end of the argument, I once again requested of counsel to the parties that the facts within their control not be changed again so that a decision could be rendered as expeditiously as possible.

Late on that same afternoon, I received phone calls from counsel for the City defendants and the AOHO advising me that there had been two new applications for the Parade permit and that an Order To Show Cause had been signed in the State Court as to why one of the applicants should not immediately receive the Parade permit.[3]

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[3] One of the new applicants, the Brooklyn Night Court Emerald Society, served the parties on February 23 with a "Motion to Intervene and In Opposition to AOH's Motion for Relief and In Support of a Motion to Dismiss" returnable on February 23 before this court. This may have been intended simply as a lark. It clearly violates the Federal Rules of Civil Procedure and the Local Rules in various ways, but particularly with regard to the proper notice required to be given to the parties. In any event, I will treat it totally as a nullity.

## DISCUSSION

**[1]** The main problem with the logic of the decision of the City's Human Rights Commission is that it starts the analysis at the wrong end. The first question that should have been considered is not whether the New York St. Patrick's Day Parade is a public accommodation, but whether the Parade and its message constitutes speech protected by the First Amendment guarantee of Freedom of Speech. Insofar as a parade constituted protected free speech, it cannot be a public accommodation.

**[2]** A parade is, by its nature, a pristine form of speech. *See Perry Educ. Assoc.* v. *Perry Local Educator's Assoc.*, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 152, 89 S.Ct. 935, 939, 22 L.Ed.2d 162 (1969); *Cox* v. *Louisiana*, 379 U.S. 536, 554-55, 85 S.Ct. 453, 464-65, 13 L.Ed.2d 471 (1965); *Invisible Empire of the Knights of the Ku Klux Klan* v. *Mayor of Thurmont*, 700 F.Supp. 281, 286-87 (D.Md.1988). In parades, people gather together for the purpose of expressing their message. *See id.* The public thoroughfares of our nation are the public fora in which the issues of the day can be debated and where individuals seek to engage in basic expressive activity, such as parading. *Id.*; *Grayned* v. *City of Rockford*, 408 U.S. 104, 115, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972) (citing *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 94-96, 92 S.Ct. 2286, 2289-90, 33 L.Ed.2d 212 (1972)); *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939). Every parade is designed to convey a message. *Id.* As such, a parade organized by a private sponsor is the quintessential exercise of the First Amendment right of freedom of expression. *Id.*

**[3]** The First Amendment guarantees an individual the right to free speech, "a term necessarily comprising the decision of both what to say and what not to say." *Riley* v. *Nat's Federa-*

*tion of the Blind of North Carolina*, 487 U.S. 781, 796-97, 108 S.Ct. 2667, 2677-78, 101 L.Ed.2d 669 (1987). In exercising this right, the message intended to be conveyed by a parade sponsored by a private organization is to be determined by the parade sponsor and not by the state or the city. *See Grayned*, 408 U.S. at 115, 92 S.Ct. at 2302; *Collin* v. *Smith*, 578 F.2d 1197, 1201 (7th Cir.), *cert. denied*, 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978); *Invisible Empire*, 700 F.Supp. at 286-87. To hold otherwise would give local government the right to censorship over the thoughts and speech of the people. *Id.*; *see also Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1, 10-11, 15-17, 106 S.Ct. 903, 908-09, 911-12, 89 L.Ed.2d 1 (1986) (state could not compel company to include in its billing a third party's message it disagreed with); *Wallace* v. *Jaffree*, 472 U.S. 38, 48-55, 105 S.Ct. 2479, 2485-89, 86 L.Ed.2d 29 (1985) (First Amendment adopted to curtail power of Congress to interfere with individual's freedom to "express himself in accordance with the dictates of his own conscience"); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256, 94 S.Ct. 2831, 2838, 41 L.Ed.2d 730 (1974) (forcing newspapers to print candidates' replies to editorials is an impermissible burden on editorial control and judgment); *Sherbert* v. *Verner*, 374 U.S. 398, 402, 83 S.Ct. 1790, 1792, 10 L.Ed.2d 965 (1963) (government may "not compel affirmance of a repugnant belief . . . nor penalize or discriminate against individuals or groups because they hold views abhorrent to the authorities"); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 634, 63 S.Ct. 1178, 1183, 87 L.Ed. 1628 (1934) (state has no power to force individual to profess any statement of belief).

**[4]** The message that the AOH, as Parade sponsor, wishes to convey is to honor the patron saint of Ireland and to proclaim their allegiance to the Roman Catholic Church and its teachings. Plaintiff's Memorandum of Law In Support of Motion

for Summary Judgment or a Preliminary Injunction ("AOH Mem.") at 9.

On the other hand, the Administrative Law Judge rejected this and found that the Parade is a place of public accommodation. Decision of Administrative Law Judge Maldonado, at 2, attached to the Hartnett Affidavit at Exh. 7 [hereinafter referred to as "ALJ Maldonado Decision"]. As to the message of the Parade, the Administrative Law Judge and the City Human Rights Commission determined that:

> The Parade is also a civic celebration, billed as the "largest civilian annual parade in the world" and is organized for the pleasure of all New Yorkers. It draws over 150,000 marchers and over two million spectators.
>
> . . . [T]he Parade is "an American institution" which "celebrates the fact that all Americans, native and immigrant alike, enjoy the freedom of the City on the streets of New York and, by implication, throughout our great land." The organizers operate the Parade for the benefit of all New Yorkers and are concerned that "the total Parade . . . remain large in numbers, orderly, and colorful in order to hold the respect and admiration of the citizens of New York, retain their good will and continue to have them as its supporters."

ALJ Maldonado Decision at ¶¶ 10-11. (citations omitted).

In restating the message of the Parade the Human Rights Commission went far beyond a mere re-articulation of it. No one has suggested that the Parade sponsors and their representatives are so bereft of fluency in the English language that, if they believed that the message of the Parade should be "secular" or "American institution" or "a celebration of freedom" or even traditional values, baseball and apple pie, the Commission would have had to make the statement for them.

In fact, the message was dramatically changed in content. This the City defendants cannot do without violating the First Amendment rights of the Parade sponsors. This is so fundamental as not to require citation.

It may well be helpful, however, to remind the parties of what the United States Supreme Court held in a slightly different context:

> The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way [the State] commands, an idea they find morally objectionable.

*Wooley* v. *Maynard*, 430 U.S. 705, 715, 97 S.Ct. 1428, 1435, 51 L.Ed.2d 752 (1977).

The manner and means by which the message is also a matter of constitutionally protected free speech. The AOH and the Parade sponsors have made it abundantly clear that they are unwilling to accept ILGO as a separate contingent in the Parade. Indeed, they seem willing to abandon the Parade to avoid that situation. Yet, the City Human Rights Commission has ordered them to "include the Irish Lesbian and Gay Organization in the parade under its own banner." *See* Letter to this court from Corporation Counsel, dated February 17, 1993.

In so doing the City defendants have violated the Parade sponsor's rights to free speech. *See Invisible Empire*, 700 F.Supp. at 288. The United States Supreme Court has already held that "[c]ompelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set. . . . The Commission's . . . order also impermissibly requires appellant to associate with speech with which appellant may disagree." *Pacific Gas*, 475 U.S. at 9, 15, 106 S.Ct. at 908, 911. That, however, is exactly what the City

defendants are trying to do by requiring the inclusion of ILGO in the New York St. Patrick's Day Parade.

**[5-7]** This is not to say that a governmental regulation may never restrict a parade. A municipality may constitutionally restrict the right to use the public streets, as they must exercise a great deal of control over traffic regulation and public safety. *Shuttlesworth*, 394 U.S. at 152, 89 S.Ct. at 939. Such restrictions, however, may seek to regulate only the time, place and manner of a parade, so long as these restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1980) (citing *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3068, 82 L.Ed.2d 221 (1984)). Additionally, incidental restrictions on speech have been upheld where the purpose of the offending regulation is unrelated to the content of the expression. *Ward*, 491 U.S. at 781, 109 S.Ct. at 2746. The controlling inquiry in such cases focuses on whether the government has regulated the speech because it disagrees with its content. *Id.* Thus, if the government's purpose underlying the regulation is justified without reference to the content of the regulated speech, then the incidental infringement of the First Amendment is constitutional, notwithstanding disparate impact. *Id.*

Here the City has attempted to change the message of the Parade and the way that message would be conveyed. The imposition of such conditions can hardly be confused with the permissible restrictions that regulate time, place or manner. Thus, because there is no "content neutral" justification for the City's actions which could excuse the infringement, they violate the First Amendment.

The AOH also raises the argument that the activities of the City defendants have violated the AOH's right to freedom of

association under the First Amendment. There may well be substance to this argument.

**[8]** Implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with whomever one chooses. *See Roberts* v. *United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 3251, 82 L.Ed.2d 462 (1983); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 233-34, 97 S.Ct. 1782, 1798-99, 52 L.Ed.2d 261 (1977). This freedom of association embraces the concomitant right not to associate with whomever one chooses. *See Roberts*, 468 U.S. at 623, 104 S.Ct. at 3252 (citing *Abood*, 431 U.S. at 234-35, 97 S.Ct. at 1799-1800).

I find it unnecessary, however, to rule on this issues.

The AOH also argues that the City defendants have violated their religious freedom. I am in no way ruling on that particular issue nor do I believe that anyone can properly rule on it in the present state of this record.

Counsel have also directed my attention to a recent decision from a Massachusetts Superior Court regarding the Boston St. Patrick's Day/Evacuation Day Parade. *Irish American Gay, Lesbian, and Bisexual Group of Boston, et al.* v. *City of Boston, et al.*, Superior Court of Mass., Suffolk County, Civ. No. 92-1519 (Feb. 19, 1993). In the Boston case, the Court granted the Irish American Gay, Lesbian, and Bisexual Group of Boston an injunction to prevent the defendants from interfering with their participation in the parade. It is argued that this decision should persuade me to enforce the City defendants' order requiring the inclusion of ILGO in the AOH Parade.

The Boston Parade celebrates not only St. Patrick's Day, but also, Evacuation Day. Evacuation Day commemorates the March 17, 1776 departure of British troops from Boston. The parade conveys a general celebratory message in general support of "traditional values."

Although the Court pressed counsel to articulate the 'views' or 'message' [sought to be] express[ed] by means of the parade,

counsel could say nothing beyond a litany of 'traditional values,' which included the Red Sox and apple pie.

Memorandum and Order of the Court at *k* 2. The fact that this "traditional values," multi-purpose parade requires "detailed participation by city agencies in planning and execution" clearly illustrates the civic nature of the parade. From the Order of the Massachusetts Court, it appears that last year the exact same problem was before the Court and was resolved in the same way. No problem was caused thereby and no appeal was taken from the Order. In light of these factors, the Court held that the defendant permit-holders were "the custodians of a civic celebration."

The AOH and the Parade Committe, on the other hand, are private sponsors of the New York St. Patrick's Day Parade and seek to convey a real message in a parade devoted solely to celebrating St. Patrick's Day with minimal city involvement. The AOH, unlike the Boston sponsors, most certainly are not the "custodians of a civic celebration." I find this decision to be totally inapposite to the instant case.

In sum, in the case at bar involving only the New York St. Patrick's Day Parade, this court holds that the ruling of the City's Human Rights Commission is violative of the First Amendment in two aspects: (1) by rejecting the message that the AOH claimed for the Parade and by substituting its own version of what the Commission thought the message of the Parade was or should be, the City defendants have attempted to dictate what the Parade sponsors would think; and, (2) by forcing the inclusion of ILGO in the parade, the Commission sought to dictate how the Parade sponsors would express their thoughts. Such activity (telling citizens what they must think and how they must express themselves) is something one would expect from the "Thought Police" described by George Orwell. The humor of naming the thought police the "Human Rights Commission" is particularly Orwellian.

This court does not mean to suggest that the members of the City Human Rights Commission intentionally set out to violate the First Amendment to the Constitution. Surely, they are good persons, motivated by good intentions. But it is the American way for political leaders to seek to convince citizens of the correctness of some view by persuasion and not by fiat.

This court holds no brief for either side in this controversy. However, everyone should recognize that the undermining of the freedom of any individual is the undermining of the freedoms of us all. *See Collin* v. *Smith*, 578 F.2d 1197, 1210 (7th Cir. 1978), *cert. denied*, 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978). Suffice it to say that the job of this court is to uphold the Constitution of the United States and that is all I am trying to do.

## THE REMEDY

Perhaps, because of the haste with which this case was brought on, without even formal motion papers, or the time pressure caused by the fact that the date for the Parade is so close at hand, no one has discussed the relief which should be granted. The demand in the Complaint requests this court to:

> (a) Preliminarily and permanently enjoin City defendants from continuing the acts, practices, and policies complained of herein which violated plaintiff's right to freedom of speech, expression, association and free exercise of religion as guaranteed by the First and Fourteenth Amendments to the United States Constitution;
>
> (b) Preliminarily and permanently enjoin City defendants from continuing the acts, practices, and policies complained of herein which violate 42 U.S.C. §§ 1983;
>
> (c) Direct Defendants Police Commissioner and Police Department to revoke, cancel and annul the permit issued to the Defendant Committee to parade on Fifth Avenue on

March 17, 1993 and compel said City defendants to issue a permit to plaintiff to conduct a parade on Fifth Avenue on March 17, 1993;

(d) Grant a permanent injunction against the City defendants prohibiting them from obstructing or interfering with plaintiff's conducting of the Parade;

(e) Award attorney's fees to the plaintiff as authorized by 42 U.S.C. § 1988; and

(f) Grant such additional and further relief as the court deems just and equitable.

Complaint, *ad damnum* clause at 11.

The memorandum of the AOH submitted on its motion claims that it "is entitled to summary judgment granting a permanent injunction. In the alternative, plaintiff's motion for a preliminary injunction should be granted. . . ." AOH's Mem. at 18.

Clearly, summary judgment is inappropriate in a case such as this where the facts have seemed to shift as the desert sands in the midst of a wind storm. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 993, 8 L.Ed.2d 176 (1962). This leaves the question as to whether a preliminary injunction should be issued to stop the City's violation of the AOH's constitutional rights to free speech. As I have outlined above, it is clear that the City has violated the AOH's right to freedom of speech. Normally a court only has to determine that a constitutional right is being violated as to one of the parties for an injunction to issue. In the instant case, however, entities other than the AOH also have constitutional rights which must be considered.

ILGO has not requested anything other than inclusion in the AOH Parade. It may be politic for the City to offer some other perquisite to ILGO, but this court cannot fashion any relief what-

soever for ILGO since it has failed to ask for any relief. One thing is certain, however, no one can force the inclusion of ILGO in the AOH Parade.

Nor can this court fashion any relief whatsoever for the other applicants for the St. Patrick's Day Parade permit because neither of them have filed proper motions to intervene in this court.

The last question then is what relief must be granted to the AOH. Over the years, the City has maintained a file of organizations entitled to parade permits. Indeed, Chief Judge Motley of this court in another parade case involving New York City said:

> [The City] as a matter of administrative policy, reserves certain routes, dates, times and places for what have become annual events. For instance, a parade permit is reserved for the New York County Board of the Ancient Order of Hibernians for the St. Patricks [*sic*] Day Parade on March 17. A permit will be issued for no other parade on Fifth Avenue other than the Gay Pride Parade on the last day of June.

*Gay Veterans Association, Inc.* v. *The American Legion—New York County Organization*, 621 F.Supp. 1510, 1516 (S.D.N.Y. 1985).

If it were not for the intervention of the patently unconstitutional Human Rights Commission decision in this matter, the AOH would have the permit to conduct the 1993 New York St. Patrick's Day Parade. It is entitled to that as preliminary relief; along with an order directing the City not to interfere with the conduct of the AOH's 1993 New York St. Patrick's Day Parade by requiring the inclusion of any contingent which has not been approved by the AOH and the Parade Committee. This order is preliminary in nature and is intended to cover only the 1993 New York St. Patrick's Day Parade.

SO ORDERED.

# APPENDIX B.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
No. 92-1516

IRISH-AMERICAN GAY, LESBIAN
AND BISEXUAL GROUP OF BOSTON,[1]
*Plaintiff,*

*v.*

CITY OF BOSTON, SOUTH BOSTON ALLIED WAR
VETERANS COUNCIL, AND JOHN J. "WACKO" HURLEY,[2]
*Defendants.*

## FINDINGS OF FACT, RULINGS OF LAW, AND ORDER FOR JUDGMENT

This case involves the claimed right of the plaintiff, Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB), to march in Boston's annual St. Patrick's/Evacuation Day Parade (Parade) over the opposition of the defendants, South Boston Allied War Veterans Council (Veterans or Veterans Council), who organize and run the Parade. GLIB contends that its exclusion from the Parade violates G.L. c. 272, §§ 92A and 98, which prohibit sexual orientation discrimination in places of public accommodation. GLIB also alleges that the Veterans's exclusion of GLIB from the Parade abridges GLIB

[1] By and through Timothy Daley and Cathleen Finn, individually and as representatives of the Irish-American Gay, Lesbian and Bisexual Group of Boston.

[2] John J. "Wacko" Hurley is named as a defendant both individually and as a representative member of the South Boston Allied War Veterans Council.

members' constitutional rights to freedom of expression and association and denies them equal protection of the laws as guaranteed by the First and Fourteenth Amendment to the United States Constitution and Articles 1 and 16 of the Massachusetts Declaration of Rights. GLIB seeks declaratory and permanent injunctive relief. The Veterans Council contends that it may lawfully exclude GLIB because neither the public accommodations statute nor the 14th Amendment applies to its Parade. The Veterans argue that the Fourteenth Amendment is irrelevant because there is no state action; and the statute is inapplicable because the Parade is not a place of public accommodation, and because application of it would be an impermissible infringement of the Veterans' constitutional right of expressive association.

The City of Boston (City) is also a defendant. GLIB alleges that the Parade is subject to the 14th Amendment, and therefore exclusion of it on account of its sexual orientation offends the equal protection clause and interferes unlawfully with its freedoms of association and expression. The Veterans cross-claim against the City for its unlawful interference with their Parade. The City denies that the Parade is a state action event and denies the Veterans cross-claim allegations.

On the basis of a four-day bench trial, which heard 12 witnesses and received 113 exhibits, I make the following findings of fact and conclusions of law as required by Mass. R. Civ. P. 52(a).

**Discussion.**

GLIB alleges that by denying its members the right to register for and march in the 1993 Parade because of their sexual orientation, both the City and the Veterans violated G.L. c. 272, §§ 92A and 98 (the public accommodations law). Section 98 prohibits "any distinction, discrimination or restric-

tion on account of . . . sexual orientation . . . in any place of public accommodation, resort or amusement" and the aid or incitement thereof. G.L. c. 272, § 98.

In January of 1992, Barbra Kay and others[3] founded the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB"). As the name tells, GLIB is an organization of Irish-Americans who are gay, lesbian, or bisexual, and their supporters. A social organization, GLIB was formed to march in the St. Patrick's/Evacuation Day Parade. GLIB's purposes were threefold: to express its members' pride in their dual identities; to demonstrate to the Irish-American and to the gay, lesbian, and bisexual communities the diversity within those respective communities; and to show support for the Irish-American gay, lesbian, and bisexual men and women in New York City ("ILGO" members) who were seeking to participate in the New York St. Patrick's Day Parade. GLIB has regular meetings about once a month, produces a newsletter for members, maintains a voicemail box, and has published an informational brochure. GLIB members also participate in various cultural and social activities, including the 1993 Dorchester Day Parade and a fundraising walkathon for the AIDS Action Committee.

When the Veterans initially denied GLIB's application to participate in the 1992 Parade, they cited "safety reasons and insufficient information regarding [the] social club." Exh. 72. GLIB marched uneventfully in the 1992 Parade under court order.[4] In 1993, the Veterans again denied GLIB permission to participate in the Parade, asserting the decision to exclude groups with sexual themes merely formalized that the Parade expresses traditional religious and social values. Exh. 43. At the recent trial, John J. Hurley equivocated about his reasons for excluding GLIB but ultimately testified that he would never

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[3] Cindy Toombs and Ellie Rudolph.

[4] *Irish American Gay, Lesbian & Bisexual Group of Boston* v. *City of Boston*, C.A. No. 92-1518 (Suffolk Super. Ct., March 11, 1992, Zobel, J.).

allow GLIB to march.[5] These shifting explanations for excluding GLIB demonstrate the pretextual nature of these excuses. *Invisible Empire of the Knights of the Ku Klux Klan* v. *Thurmont*, 700 F.Supp. 281, 287 (D. Md. 1988). The evidence establishes that GLIB was excluded from the Parade on account of its members sexual orientation, and I so find. *See also Meredith* v. *Fair*, 305 F.2d 343, 361 (5th Cir. 1962) (finding no valid, non-discriminatory reason for University to reject Meredith).[6]

In order for the public accommodations law to apply, however, the Parade must be "a place of public accommodation, resort or amusement" as defined by section 92A. The plaintiff urges that the statute should be construed broadly in order to

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[5] Hurley speaks for the Veterans Council and he testified on its behalf. He indicated that the objection to GLIB's participation was based on the belief, although unsubstantiated, that its members were also members of the ACT-UP and Queer Nation. The group's potential for being disorderly was offered as a reason for excluding it. The defendant's final position was that GLIB would be excluded because of its values and its message, *i.e.*, its members' sexual orientation. Tr. of Closing Arg. pp. 43, 51-52 (Nov. 23, 1993).

[6] Several cases, although they are distinguishable on other grounds, illuminate the invalidity of the Veterans' purported reasons for excluding GLIB. Excluding all sexual themes not only contravenes the First Amendment's prohibition on content-based restrictions. *see Consolidated Edison Co. of N.Y.* v. *Public Service Comm'n of N.Y.*, 447 U.S. 530, 537-38 (1980)9 (prohibiting discussion of an entire topic violates the First Amendment), but is a form of discrimination itself. *See Loving* v. *Virginia*, 388 U.S. 1, 8 (1967) (rejecting notion that equal application of miscegenation statutes did not constitute invidious racial discrimination). Consequently, the Veterans' exclusion of GLIB under the guise of excluding all groups with sexual themes violates the public accommodations law's prohibition on sexual orientation discrimination. Moreover, denying GLIB's participation because some of its members might be associated with a radical group assumes guilt by association but is not proof of disruptiveness. *See Healy* v. *James*, 408 U.S. 169, 189-91 (1972) (assumed association with national group advocating violence did not constitute evidence that local group would be disruptive). The record demonstrates no basis for concluding that GLIB's participation would incite imminent lawlessness. *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). Just as undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression, *see Tinker* v. *Des Moines Independent School Dist.*, 393 U.S. 503, 508 (1969), the Veterans' denial of GLIB's application due to the purported association of some of its members would not withstand scrutiny under the statute.

effectuate its remedial purpose. The Veterans argue that a parade, unlike a tavern or a barbershop, can not be a "place of public accommodation, resort or amusement." Although our courts have held preliminarily that the Parade is subject to the statute, *Irish American Gay, Lesbian & Bisexual Group of Boston* v. *City of Boston*, No. 93-J-183 (Mass. App. Ct. March 1, 1993, Brown, J., single justice) (affirming preliminary injunction requiring GLIB's inclusion in 1993 Parade); *Irish American Gay, Lesbian & Bisexual Group of Boston* v. *City of Boston*, C.A. No. 92-1518 (Suffolk Super. Ct. Feb. 19, 1993, Zobel, J.); *Irish American Gay, Lesbian & Bisexual Group of Boston* v. *City of Boston*, C.A. No. 92-1518 (Suffolk Super. Ct. March 11, 1992, Zobel, J.), the Veterans point to an expression of judicial doubt on the subject, *South Boston Allied War Veterans Council* v. *The Honorable Hiller B. Zobel*, C.A. No. 93-10509-WF (D. Mass. March 11, 1993, Wolf, J.) (noting public accommodations statute does not expressly include parades).

The statute defines a place of public accommodation, resort or amusement as: "any place . . . which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be . . . (6) a boardwalk or other public highway; . . . [or] (8 a place of public amusement, recreation, sport, exercise or entertainment." G.L. c. 272, § 92A. As an initial matter, the Parade must be found to be "a place." *United States Jaycees* v. *Massachusetts Commission Against Discrimination*, 391 Mass. 594, 603 (1984). The statute specifically identifies "a boardwalk or other public highway" or "a place of public amusement, recreation, sport, exercise or entertainment" as places within the purview of the statute.

For at least the past 47 years, the Parade has traveled the same basic route along the public streets of South Boston, providing entertainment, amusement, and recreation to partici-

pants and spectators alike. Even if the examples enumerated in the statute (inn, theatre, etc.) restricted the general statutory language, which they do not, *Local Finance Co.* v. *Massachusetts Commission Against Discrimination*, 355 Mass. 10, 13 (1968), the public streets of South Boston can be fairly characterized as a boardwalk or a place of amusement, recreation, or entertainment during the hours of the Parade. Given the Supreme Judicial Court's directive that the statute be given a broad inclusive interpretation so that it may achieve its goal of eliminating and prevent discrimination. *Concord Rod & Gun Club, Inc.* v. *Massachusetts Commission Against Discrimination*, 355 Mass. 10, 14 (1968), I find that the Parade through the streets of South Boston constitutes "a place" within the meaning of G.L. c. 272, § 92A. *Compare United States Jaycees* v. *Massachusetts Commission Against Discrimination*, 391 Mass. 594 (1984) (finding discriminatory membership policy not subject to G.L. c. 272, § 92A because criterion of "place" not established); *see also New York Roadrunners Club* v. *State Division of Human Rights*, 81 A.D.2d 519, 437 N.Y.S.2d 681, 682 (1981) (route of New York Marathon found to be a place of public accommodation).

In denying the applicability of the statute, the Veterans contend that theirs is a private parade. I disagree. As in *Concord Rod & Gun Club, Inc.* v. *Massachusetts Commission Against Discrimination*, 402 Mass. 716, 721 (1988), the lack of genuine selectivity in choosing participants and sponsors demonstrates that the Parade is a public event. The following participants and/or sponsors were featured in the 1992 Parade: Patriot Missile Raytheon Corporation, Hallamore Clydesdale Horses, 98.5 Mix FM Radio Van, Boston Municipal Police Department, Irish Basketball Players, South Boston Resident Group, MBTA Color Guard, Vehicles and McGruff the Crime Dog, South Boston Against Drugs ("SOBAD") float, Marion Manor Seniors float, National Parks Service Rangers and Vehi-

cles, South Boston Baptist Bible Trolley float, Vietnam Era Veterans, Princeman Singing Group, Leukemia Society, City Councillors Rosaria Salerno, Albert "Dapper" O'Neil and John Nucci, WZOU 94.5 FM Trollet float, Houlihan's, Amrheim's and Irish Mist Restaurants, Shuberts Smoke Shop, Hub Video, Miss South Boston, Miss Ice-O-Rama and Miss Jr. Ice-O-Rama, Lexington Minutemen, AFL-CIO Trolley float and marchers, various high school bands, NORAD (Irish Northern Aid), Massachusetts Citizens for Life, Salem N.H. Joe Clowns, WZLX FM, WAAF FM Rock Bus, and others. The 1993 Parade featured many of the same participants and sponsors, as well as the Boston Bruins, MASSPORT, Budweiser, Mt. Washington Bank, Pepsi, various candidates for city council, various state representatives and senators, the Cycling Murrays, Citizens Committee for JFK Day, Massachusetts Water Pollution Control Association, South Boston Savings Bank, all declared and undeclared mayoral candidates in Boston, and others. Put differently, the interests and viewpoints represented are truly catholic: commercial (Budweiser), religious (Southie Baptists); political (Councillor O'Neil), eleemosynary (Leukemia Society), patriotic (Vietnam Veterans), moral (Massachusetts Citizens for Life), theatrical (Joey Clowns), athletic (Boston Bruins), public service (Massport), trade union (AFL-CIO), and so on. Indeed, since 1947 the only groups that have been excluded from the Parade besides GLIB have been the Ku Klux Klan and ROAR (Restore Our Alienated Rights).[7] Neither of these groups, however, is protected under G.L. c. 272, §§ 92A and 98.

The Veterans Council has no written procedures, criteria, or standards for selecting participants or sponsors. Applications for participation in the next year's Parade are sent to all previous

[7] The Veterans denied ROAR permission to participate based on its anti-busing message.

previous participants. Those who call to inquire about participating in the Parade are sent applications, and depending upon the monies available they are reimbursed for their travel expenses or costs of performance. Applications from new groups are voted on in batches,[8] and the Veterans do not generally inquire into the specific messages or views of each applicant.

In addition, some groups participate in the Parade without submitting an application to the Veterans Council. For instance, in 1993, the Boston Bruins did not apply to the Veterans Council, but simply showed up at the Parade and marched. Other groups gained entrance by making a contribution to the Parade rather than filling out an application form.[9] Thus, the procedures for admittance into the Parade are not uniformly applied.

Moreover, South Boston's St. Patrick's/Evacuation Day Parade is a public celebration of longstanding. It celebrates both St. Patrick's Day and Evacuation Day. Evacuation Day, which also falls on March 17, commemorates General Washington's initial military victory over the British in 1776, and the British departure from South Boston. Exh. 92. It is an officially recognized historical event in Massachusetts and a Suffolk County holiday.[10]

During the first half of this century, the South Boston Citizens Association and the City of Boston organized the various

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[8] Regardless of the formality of a vote by the Veterans Council, I find that the decision on participation (when there is a decision, *see infra*) is made by the defendant Hurley. Whether the Veterans Counci genuinely votes or merely rubberstamps Hurley's decision is immaterial because on the question of GLIB's participation Hurley and the Veterans Council are of one mind.

[9] Participants not filling out appiclation forms included the Massachusetts Water Pollution Control Association, newly declared mayoral candidates, and others.

[10] The General Court of Massachusetts established Evacuation Day in 1938. *See* G.L. c. 6, § 12K. It is a paid holiday for city employees and a holiday for Boston Public Schools. A variety of activities take place from March 1 to March 17 to celebrate Evacuation Day, including a boxing show, the Ice-O-Rama, a basketball freethrow contest, historic and memorial exercises, a swimming event, an Irish forum, among others.

Evacuation Day activities. In 1901, the City celebrated the 125th anniversary of Evacuation Day by a parade, artillery salute, concert, and fireworks display, among other events. In 1947 Mayor James Michael Curley granted the Veterans Council authority to organize and conduct the Parade.[11] Since that time, the City has annually granted the Veterans a parade permit.[12] No other applicant has applied for the permit.

Over the years, the Parade has featured as many as 20,000 participants and as many as 1,000,000 spectators. In 1992, the Parade featured about 10,000 participants and 750,000 spectators. The 1993 Parade, postponed due to inclement weather, had fewer than 10,000 participants, about 400,000 spectators, and was aired live by Boston's community access cable television channel. The Parade is one of the six largest parades held in Boston annually, and the largest New England event for Irish-Americans, their friends, and well-wishers.

Given the lack of selectivity exerted by the Veterans over the Parade participants and sponsors, as well as the Parade's historical roots, I conclude that the Parade is a public event. *Concord Rod & Gun Club, Inc.* v. *Massachusetts Commission Against Discrimination*, 402 Mass. 716, 721 (1988). As such, I find that the Parade constitutes a public accommodation within the meaning of G.L. c. 272, § 92A. Consequently, the Veterans' exclusion of GLIB based on the sexual orientation of its members violates the public accommodation statute.

By its terms, G.L. c. 272, § 98 also forbids aiding or inciting discrimination based on sexual orientation in places of public

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[11] The Veterans Council is an unincorporated association, consisting of members who are elected from various South Boston Veterans of Foreign Wars, American Legion, and Disabled Veterans Posts.

[12] The City of Boston Transportation Department (BTD) has authority to issue permits for all parades within the City of Boston. Parades are lawful only if the BTD has issued a permit for it. Acts, 1929, c. 263, § 2 as amended; Rules and Regs. of BTD, Art. VIII, § 1 as amended through Jan. 2, 1988. Neither the BTD nor the City charge a fee for parade permits.

accommodation, resort or amusement, and GLIB alleges that the City by its conduct has violated the statute. Did the City's involvement in the 1993 Parade constitute aiding or inciting the Veterans in their violation of GLIB's rights under the public accommodations statute?[13]

The following facts were adduced at trial. The City, through the BTD, provides services for the six largest parades in Boston: posting "no parking" signs along the route, ticketing and towing vehicles along the route, and occasionally erecting barriers or roping the route. The City also provides myriad services through the Office of Business and Cultural Development to any parade sponsors at their request. These services include the use of the City's printing services and planning and organizational assistance. Additionally, the City provides police, fire, emergency, and public works services to every parade or function in the City comparable to the Parade.

Although the City's involvement dates back to the Parade's beginning, over the years the City has divorced itself from the Parade. Thus, for the 1993 Parade, the City's involvement consisted of the participation of city vehicles such as fire, ambulance, and police in the Parade itself. The City also supplied clean up services for the 1993 Parade costing a total of approximately $8,000. This amount is comparable to other parades of similar size.[14] Many of these services constitute rou-

[13] The City's involvement in the 1992 Parade is not before this court as the plaintiffs failed to file a complaint before the Massachusetts Commission Against Discrimination. Since violations of the public accommodations law fall within the purview of the G.L. c. 151B, § 5, the filing of a prior complaint with the MCA is a jurisdictional prerequisite that cannot be waived. *See Ackerson* v. *Dennison Mfg. Co.*, 624 F.Supp. 1148, 1150 (D. Mass. 1986) (jurisdictional requirement cannot be waived); *East Chop Tennis Club* v. *Massachusetts Comm'n Against Discrimination*, 364 Mass. 444, 446 (1973) (G.L. c. 272, § 98 falls within the ambit of G.L. c. 151B, § 5).

[14] In 1993, the Bunker Hill Day Parade route cost $9,369.91 to clean, while the Columbus Day and Dorchester Day Parades cost $6,189.23 and $7,815.38, respectively.

tine functions of government *See Otway* v. *City of New York*, 818 F.Supp. 659, 654 (S.D.N.Y. 1993) (providing police and sanitation services for parade are a legitimate governmental function and do not constitute the establishment of religion in violation of the First Amendment).

In mid-November of 1992, GLIB notified the Mayor of its intention to march in the 1993 Parade. On the same day, Richard A. Dimino, Commissioner of the BTD, wrote to the Veterans asking them to submit their 1993 permit application by mid-December and asking whether they planned to abide by the 1992 court order. The Veterans refused to state whether they would comply with the 1992 order and demanded that the BTD immediately issue the 1993 permit.

In determining whether to issue a permit, the City may consider only time, place, manner, and public safety. *See Cox* v. *New Hampshire*, 312 U.S. 569, 576 (1941).[15] The City may not consider either the content or subject manner of the speech in its decision to grant a permit. *Consolidated Edison of N.Y.* v. *Public Service Comm'n of N.Y.*, 447 U.S. 530, 536 (1980).

> For while a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes . . . and may even forbid altogether such use of some of its facilities . . . what a municipality may not do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression. . . . Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.

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[15] Acts, 1929, c. 263, establish the Boston Traffic Commission and define its powers. The BTD has its own rules and regulations as well which set forth other considerations. *See* BTD, Rules and Regs., Art. VIII, § 2(a) and (b).

*Hudgens* v. *National Labor Relations Board*, 425 U.S. 507, 520 (1976) (internal quotations and citations omitted).

Sensing its dilemma, the City turned to the court for guidance; it moved for clarification as to whether the 1992 order also applied to the 1993 Parade. That motion was denied. *Irish American Gay, Lesbian & Bisexual Group of Boston* v. *City of Boston*, C.A. No. 92-1518 (Suffolk Super. Ct. Dec. 11, 1992, Zobel, J.).

On December 16, 1992, the BTD contacted the Veterans by a letter stating that "as a public official, the Commissioner is mindful that the parade organization and conduct are subject to anti-discrimination laws which extend to many protected characteristics including sexual orientation, as set forth in Chapters 151B and 272, Sections 92 and 98, of the General Laws."

Exhibit 11. On December 23, 1992, the BTD issued to the Veterans a conditional permit for the 1993 Parade, requiring the Veterans to cooperate with the Boston Police Department in devising a public safety plan for the Parade in the event that the court ordered GLIB's participation. The Veterans complied with this condition and on February 16, 1993, the City granted the Veterans a permit for the 1993 Parade. On February 19, 1993, the court granted GLIB a preliminary injunction enjoining the Veterans from excluding GLIB from the 1993 Parade.

GLIB contends that the City's actions in granting the Veterans a permit, knowing that the Veterans intended to exclude GLIB from the Parade in violation of the public accommodations statute, amounts to a violation of G.L. c. 272, § 98. Additionally, GLIB argues that by failing to enforce the public accommodations law, the City aided the Veterans in their violations of G.L. c. 272, § 98. Although the clause of the relevant statute relating to liability for aiding or inciting discrimination in a place of public accommodation has not been

interpreted by our appellate courts, I hold that the City's actions do not rise to that criminal statutory level of assistance or incitement.

While the City could have required the Veterans to promise to admit GLIB into the Parade in compliance with the public accommodations law, *see Healy* v. *James*, 408 U.S. 169, 193 (1972) (college administrator could constitutionally require group seeking official university recognition to affirm in advance its willingness to abide by reasonable campus laws), the applicability of the public accommodations statute was in dispute at the time. *See South Boston Allied War Veterans Council* v. *The Honorable Hiller B. Zobel*, C.A. No. 93-10509-WF (D. Mass. March 11, 1993, Wolf, J.) (questioning applicability of G.L. c. 272, § 98 to parades). Although the City is obliged by its own ordinances not to discriminate in places of public accommodations on the basis of sexual orientation, Boston City Ordinances c. 16, § 406 (1984), it is likewise prohibited from abridging the First Amendment rights of its citizens, which the Veterans claimed to be exercising. *Hudgens* v. *National Labor Relations Board*, 425 U.S. 507, 520 (1976). Therefore, while I conclude that the City's inaction was discreditable, it was not aiding or inciting under G.L. c. 272, § 98.

The most that can be said of the City's conduct is that it allowed the Veterans to hold a parade, for without a permit a parade is not lawful. But issuing a parade permit is a neutral act. *Otway* v. *City of N.Y.*, *supra* at 662. Moreover, the City did not encourage, assist, or act in cooperation with the Veterans in their attempt to discriminate against GLIB. As in cases discussing "aiding" in terms of accomplice liability, there must exist a "purposive attitude toward" accomplishing the result. *United States* v. *Peoni*, 100 F.2d 401, 402-403 (2d Cir. 1938); *see also Commonealth* v. *Raposo*, 413 Mass. 182, 185 (1992) (discussing accomplice liability). GLIB has failed to

demonstrate that the City intended to facilitate the discrimination against GLIB by granting the Veterans a permit. *See Invisible Empire of the Knights of the Ku Klux Klan* v. *Thurmont*, 700 F.Supp. 281, 287 (D.Md. 1988) (granting of parade permit and police presence does not constitute state espousal of discriminatory policies). To the contrary, the City's then Mayor attempted to persuade the Veterans to allow GLIB to march. Under these circumstances, it cannot be said that the City aide or incited the Veterans in violating GLIB's rights under G.L. c. 272, § 98.

GLIB also challenges its exclusion from the Parade on the ground that such action violates its members' constitutional rights of freedom of expression and association and denies them equal protection of the laws as guaranteed by the First and Fourteenth Amendment to the United States Constitution. A finding of state action is necessary to implicate these federal constitutional guarantees. *See, e.g., San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U.S. 522, 542 (1987) (fundamental inquiry focuses on whether a governmental actor is involved to implicate constitutional prohibitions); *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 837 (1982) (First and Fourteenth Amendments apply to acts of the state, not to the actions of private individuals or entities); *Lugar* v. *Edmonson Oil Co., Inc.*, 457 U.S. 933, 936 (1982) (state action requirement reflects fact that constitutional rights are protected only against governmental infringement). Thus, we must determine whether the City's involvement in the Parade is sufficient to establish the requisite state action so as to implicate the United States Constitution. *See Phillips* v. *Youth Development Program, Inc.*, 390 Mass. 652 (1983) (discussing state action requirement).

GLIB seeks injunctive relief, so while the City's role in the 1992 Parade is relevant and admissible as evidence, its current

and prospective participation is more significant.[16] Assuming that the Parade began as a civic celebration, the present question is whether the City has sufficiently disengaged itself from the Parade to negate a finding of state action.[17]

Various activities that are ostensibly private have been found by different analyses to be state action for constitutional purposes. Elections to public office are governmental functions that cannot be put out of the Constitution's reach. *Terry* v. *Adams*, 345 U.S. 461 (1953). Private use of state processes or mechanisms may be state action. *Batson* v. *Kentucky*, 476 U.S. 79 (1986) (racially discriminatory jury challenges); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) (state enforcement of private racially restrictive covenants). Private discrimination may become state action when it is implemented by public authorities. *Evans* v. *Newton*, 382 U.S. 296 (1977) (city operation of privately donated racially segregated park). A typically private enterprise is subject to constitutional requirements where it maintains a mutually dependent relationship with the state. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) (privately owned restaurant in a City-owned parking garage).

In asserting its constitutional claims here, GLIB contends that the City is inextricably intertwined in the sponsorship and planning of the Parade so as to require a finding of state action. In so concluding, GLIB relies on *Evans* and *Burton*, above. Additionally, GLIB argues that while parades are not traditionally a governmental function, this Parade is such.

The City maintains that its participation does not amount to state action as that concept is now defined by the Supreme Court. Predictably, the Veterans go farther: they argue that the only state action here is the City's attempt to interfere impermissibly with their private Parade.

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[16] The City's involvement in the 1992 Parade would present a closer question as to state action, but it is not before me here.

[17] The plaintiff does not argue that the Parade is immutably public. GLIB concedes that the Parade could be privatized; it argues that the City has not done so.

The City is correct that the Supreme Court has narrowed the state doctrine since the days of *Evans* and *Burton*.[18] But that truism does not decide this case. The relevant questions here are: is this Parade a governmental function that has been delegated to the Veterans to perform; is the Parade a typically private function, but one so suffused with City participation as to transform it into a state action event; is the Parade a state mechanism or process which the Veterans seek to use; is there a mutually dependent relationship between the City and the Veterans' enterprise.

First, organizing or running a celebratory parade is not traditionally a governmental function in the sense of conducting a public election or running a town. *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Phillips* v. *Youth Development Program, Inc.*, 390 Mass. 653, 654-55 (1983). And the Veterans are not clothed with official authority to enable them to stage the Parade. Moreover, the Parade is a public event in the sense that it serves its spectators by entertaining them, but that does not make it state action. *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 842 (1982).

Second, a typically private event or activity may be state action where it is so extensively sponsored, regulated, and sometimes financed by the state that its choices must fairly be said to be made by the public authorities or required by them. *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). GLIB maintains that such an elaborate financial and regulatory nexus is the case here.

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[18] One commentator has recently put it as follows: "*Moose Lodge* [v. *Irvis*, 407 U.S. 163 (1972)] marked a significant contraction of the state action doctrine. The Supreme Court has consistently rejected invitations to jettison the doctrine by overruling the *Civil Rights Cases* and has insisted that state action is present only when private parties perform customary governmental functions, or when the state has required or actively encouraged the challenged private conduct, or when the conduct may be attributed to a state official or to a party acting in concert with state officials." Porter, *State Action, The Oxford Companion To The Supreme Court of the United States*, 823 (Hall, ed. New York, 1992).

In support of its nexus argument, GLIB points to the following facts. Up through the 1992 Parade, the City provided the use of its official seal, printing services, and direct funding to participants and sponsors.[19] Until 1993, the City provided approximately twenty-five percent of the Parade's total costs through the Office of Business and Cultural Development. The City also identified and contacted potential participants and disseminated information regarding the Parade. These actions, however, do not differ from the assistance the City offers other parade organizers. City monies are also available for other events and parades as well. Indeed, the City points out that its involvement here is less than it is in some other comparable events. The Veterans' Chief Marshal applies for this Parade permit, whereas the Independence Day Parade is a City event for which the City or one of its departments secures the permit. Exh. 85, 86.[20]

The focus in this inquiry is not on the overall relationship between the City and the Veterans, but rather on the City's involvement in the Veterans' decision to exclude GLIB. *Phillips* v. *Youth Development Program, Inc.*, 390 Mass. 652, 655 (1983). That the City granted the Veterans a parade permit does not render the Veterans a government actor. *See San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U.S. 522, 543 (1987) (Congress' grant of a corporate charter to Committee did not make the Committee a government agent); *Invisible Empire of the Knights of the Ku Klux Klan* v. *Thurmont*, 700 F.Supp. 281, 287 (D. Md. 1988) (police presence and granting parade permit does not constitute state espousal of discriminatory practices); *Gay Veterans Ass'n, Inc.* v. *American Legion*, 621 F.Supp. 1510,

[19] Similar amenities are available to all parades of comparable size.

[20] Evidence was not offered about the December 12, 1993, Sleigh Bell Parade, which may have been an enterprise of the Boston Convention & Visitatio Bureau. *Boston Globe*, December 13, 1993, p. 19.

1517 (S.D.N.Y. 1985) (issuing a parade permit does not amount to state action). Here, the City opposed the Veterans' discrimination, at least rhetorically, but even acquiescence in the Veterans' discriminatory actions does not rise to the level of state action. *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). It cannot be said that the City's regulatory scheme in issuing parade permits encouraged the Veterans to exclude GLIB from the Parade. *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982) (state will be held responsible for a private decision only when it provides coercion or significant encouragement); accord *Ponce* v. *Basketball Federation of Commonwealth of Puerto Rico*, 760 F.2d 375, 378 (1st Cir. 1985); *Phillips* v. *Youth Development Programm, Inc.*, 390 Mass. 652, 655 (1983).

While a financial nexus may be indicative of state action, the City's financial involvement here does not warrant such a finding. While the Veterans decided which bills to submit to the City for the reimbursement of the various marching groups for the 1992 Parade, the City paid the requested amounts directly to the participants and/or sponsors after the Parade. These contributions of the City prior to the 1993 Parade are insufficient to establish the required nexus where the City's financial support in no way encouraged or compelled the Veterans to exclude GLIB from the Parade. *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). Additionally, although the City made funds available to reimburse Parade participants and sponsors for the 1993 Parade, none were used. Moreover, the Mayor's reception to raise funds fo rthe Veterans' does not transform a public event into a state action event. *See San Francisco Art & Athletics, Inc.* v. *United States Olympic Committee*, 483 U.S. 522, 544 (1987) (government may subsidize private entities without constitutional responsibility attaching). GLIB's inability to identify any action by the City which in fact motivated the Veterans' private discriminatory actions precludes a finding of state action under the nexus approach.

*See Ponce* v. *Basketball Federation of the Commonwealth of Puerto Rico*, 760 F.2d 375, 378 (1st Cir. 1985) (failure to point to specific governmental actions motivated private actors discriminatory conduct fatal to constitutional claim).

Third, it cannot be said that there is state action here because the Parade is a governmental mechanism which the Veterans seek to make an instrument of discrimination. Compare *Batson* v. *Kentucky*, above. The Veterans do not seek to involve the City in their decision to exclude GLIB and, as noted above, the Parade is not a state-created mechanism or procedure.

Finally, state action will be found where there exists a "symbiotic relationship" between the government and the private actor. *Citizens to End Animal Suffering and Exploitation, Inc.* v. *Faneuil Hall Marketplace, Inc.*, 745 F.Supp. 65, 72 (D. Mass. 1990). The Court has described a symbiotic relationship as one of interdependence and joint participation. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

In support of its state action argument, GLIB notes that the Chief Marshal and Parade Adjutant for the 1992 Parade were City employees.[21] The evidence reveals that becoming Chief Marshal is a process of "coming up through the ranks," and the Chief Marshal then selects the Parade Adjutant. With respect to the 1992 Parade, the Veterans Council elected Thomas J. Lyons, a city employee, as the Chief Marshal, to be the 1992 Parade Adjutant.[22] Vaillancourt conducted his duties of organizing the parade primarily before or after work, and on the weekends. GLIB contends that the activities of these individuals leads to the conclusion that the state is inextricably involved in the Parade. I find, however, that Lyons' election had nothing to do with his status as a city employee.[23] Neither

[21] The Chief Marshal and Parade Adjutant are in charge of organizing the Parade.

[22] At this time, Lyons was the Deputy Commissioner of Veterans Affairs for the City. Vaillancourt was an employee of the Veterans Affairs Department of the City.

[23] Prior to Lyons' election, a city employee had not been elected to the position of Chief Marshall in 40 years.

Lyons' nor Vaillancourt's involvement in the Parade constitutes any participation on the City's part, and I so find.

The most important factor in this type of state action is the extent to which the City derives an economic benefit from the Veterans' discrimination. *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 843 (1982); *Ponce* v. *Basketball Federation of the Commonwealth of Puerto Rico*, 760 F.2d 375, 382 (1st Cir. 1985); *Citizens to End Animal Suffering and Exploitation, Inc.* v. *Faneuil Hall Marketplace, Inc.*, 745 F.Supp. 65, 73 (D. Mass. 1990); *see also Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 724 (1961) (finding a direct economic relationship between restaurant's discriminatory policies and State's financial position). With respect to the 1993 Parade, the City set aside $9,000 from its public celebrations budget. Exh. 87. The Veterans did not submit any bills to the City for reimbursement.[24] The Veterans did not use the City's printing services or request any assistance from the Office of Business and Cultural Development in obtaining marchers for the 1993 Parade. The Boston Public Works Department erected a set of bleachers to serve as a reviewing stand along the parade route, various police, fire, and emergency service vehicles and personnel participated in the Parade, and the City provided police and sanitation services. But those amenities did not profit the City.

After the Veterans publicly announced that they would not use public monies to help finance the 1993 Parade, the Mayor hosted a reception in honor of the Parade Committee. The reception was held at a city-owned facility and the City printed the invitations which contained the official City seal. Suggested donations for attendance were $25 per person. Although the amount of monies collected as a result of this event are not in

[24] The same amount was set aside for the 1992 Parade. Exh. 87. The budget for fiscal year 1994 does not contain any provision for the 1994 Parade. Exh. 88.

evidence, approximately 200 people attended the event. The Mayor collected contributions for the Veterans Council before, during, and after the reception which he then turned over to the Veterans. In addition, some contributions were sent directly to the Veterans Council.

As set forth above, the City issued the Veterans a conditional parade permit requiring the Veterans to cooperate in the development of a public safety plan in the event that the court mandated GLIB's participation. The City also sought judicial clarification of the 1992 court order in connection with the 1993 Parade. Most notably, the Boston Police Department determined GLIB's placement in the 1993 Parade processional after GLIB received a preliminary injunction requiring its inclusion. *Irish American Gay, Lesbian & Bisexual Group of Boston* v. *City of Boston*, C.A. No. 92-1518 (Suffolk Super. Ct. Feb. 19, 1993, Zobel, J.).

Unlike *Burton*, above, in which "profits earned by discrimination not only contribute top, but also are indispensable elements in, the financial success of a governmental agency," 365 U.S. 715, 724 (1961), no such financial benefit to the City has been demonstrated here. Rather, as noted above, the City has expended monies on the Parade prior to 1993. Furthermore, the Mayor's reception raised for the Parade were in the form of checks made out to the Veterans Council, not the City. This can be contrasted with a city-run event, such as First Night, perhaps, in which the City provides entertainment to those who purchase tickets directly from the City.

Moreover, if a symbiotic relationship actually existed, the City would not have been able to remove itself from the Parade without discontinuing the Parade altogether. *See Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961) (finding of state action justified where the state is in a position of interdependence with the private entity). Even if the City's involvement in the Parade prior to 1993 could establish the

requisite state action, the City has sufficiently removed itself from the Parade business so as to negate any such findings. Consequently, I find no symbiotic relationship exists between the City and the Veterans.

Accordingly, I find that the City's involvement in the Parade does not amount to state action. I also find that the Veterans' Council did not act on behalf of the City, but instead acted as a private party. Since the conduct of private parties is beyond the Constitution's scope, GLIB's constitutional claims must fail. *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 483 U.S. 522, 547 (1987); *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 837 (1982); *Phillips* v. *Youth Development Program, Inc.*, 390 Mass. 652 (1982).[25]

GLIB's constitutional arguments (post-trial Memorandum, pp. 17-27) appear to assume that the Massachusetts Constitution, like the Federal Constitution, protects their activities against state action interference only, not against private interference. That limitation upon the reach of the Commonwealth's Constitution's protections is questionable. *Batchelder* v. *Allied Stores International, Inc.*, 388 Mass. 83, 88-93 (1983); *O'Connell* v. *Chasdi*, 400 Mass. 686, 693-94 (1987). Also questionable is whether the Articles relied on by GLIB, one and sixteen, prohibit public or private sexual orientation discrimination. In any event, I do not reach those issues because the statute, G.L. c. 272, §§ 92, 98A, clearly applies here. Similarly, because I find that this Parade is not a state action event, I do not decide whether the discrimination here offends the Fourteenth Amendment.

Because I find that the public accommodations statute applies to the Parade, the next question is whether the statute as applied in the circumstances of this case abridges the Vet-

[25] It must be emphasized that this finding in no way immunizes the City against a different result should it undertake (or resume) greater participation in the Parade.

erans' First Amendment rights. The Veterans argue that their Parade is a form of speech protected by the First Amendment via the Fourteenth Amendment, and that their speech will be effectively diluted or distorted if they are required to include GLIB in their Parade.

The First Amendment protects two types of association from governmental interference. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 617 (1984). First, it protects an individual's right to enter into and maintain certain intimate or private relationships against unjustified governmental interference. *Id.* at 617-18; *Board of Directors of Rotary International* v. *Rotary Club of Duarte*, 481 U.S. 537, 544 (1987); *Concord Rod & Gun Club, Inc.* v. *Massachusetts Commission Against Discrimination*, 402 Mass. 716, 721 (1988). This right is not at issue here.[26] Second, the First Amendment also protects the right of expressive association. It is this right that the Veterans claim would be unconstitutionally burdened by application of the public accommodations statute.

The right of expressive association protects individuals' freedom to associate for the purpose of engaging in protected speech or religious activities. *Board of Directors of Rotary International* v. *Rotary Club of Duarte*, 481 U.S. 537, 544 (1987); *Concord Rod & Gun Club, Inc.* v. *Massachusetts Commission Against Discrimination*, 402 Mass. 716, 721 (1988). This right necessarily includes the freedom not to associate. *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 234-35 (1977). Where an association "is organized for a

[26] The right of intimate association refers to those relationships that presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 620 (1984). Contact between the Veterans and the various participants is casual, often occurring at best a few times a year and usually only in reference to the Parade. Indeed, no argument has been made that the Veterans share personal aspects of their lives with the various participating groups or sponsors.

specific expressive purpose and . . . it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion," a nondiscrimination condition may unconstitutionally infringe on the right of expressive association. *New York State Club Ass'n, Inc.* v. *City of New York*, 487 U.S. 1, 13 (1988); *see also Invisible Empire of the Knights of the Ku Klux Klan* v. *Thurmont*, 700 F.Supp. 281, 289 (D.Md. 1988). Where, however, the association consists of "[s]trangers to one another . . . and [the association] . . . admits all who are willing to pay the admission fee, . . . such a coming together to engage in [a] recreational [activity] . . . is not protected by the First Amendment." *Dallas* v. *Stanglin*, 490 U.S. 19, 25 (1989).

In the instant case, the Parade is more akin to a "social association." *See Dallas*, above. Participation in the Parade is not limited on the basis of similarity of viewpoints. The Parade celebrates a public holiday, and it is composed of diverse groups espousing myriad themes and values. The Parade is eclectic in every sense. It includes patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes. In fact, some of the messages expressed in the Parade contradict those espoused by other participants. For example, Gillette, a non-union company participated, as did the AFL-CIO. Moreover, some AFL-CIO marchers carried signs which read "Boycott Miller Beer," conflicting with the various sponsoring bars and pubs who sell such products. The only common theme among the participants and sponsors is their public involvement in the Parade. Indeed, the Veterans' position is paradoxical: a proper celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness; an assertion of a right of expressive association requires focus on a specific message, theme, or group — perhaps a Temple or Parish congregation. *See, e.g., New York County Bd. of Ancient Order of Hibernians* v. *Dinkins*, 814 F.Supp.

358, 367 (S.D.N.Y. 1993) (finding the New York St. Patrick's Day Parade conveyed a distinct message: proclaiming allegiance to the Roman Catholic Church and honoring the patron saint of Ireland). The Veterans have always opted for heterogeneousness. Given the Veterans lack of selectivity in choosing participants and failure to circumscribe the marchers' message, it is impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment.

Even if the statute does work some slight infringement on the Veterans' right of expressive association, that infringement is justified by the State's interest in eradicating sexual orientation discrimination. *Board of Directors of Rotary International* v. *Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984). On its face, the statute does not seek to suppress speech. Rather, its goal is to eliminate discrimination which is unrelated to the suppression of expression. *Board of Directors of Rotary International* v. *Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 624 (1984). Moreover, the Veterans' right of expressive association is not unduly burdened by the statute's restriction. The statute does not mandate GLIB's inclusion into the Parade; it only prevents GLIB's exclusion simply because of its members' sexual orientation. *Concord Rod & Gun Club, Inc.* v. *Massachusetts Commission Against Discrimination*, 402 Mass. 716, 722 (1988). Consequently, any incidental abridgement of the Veterans' speech is no greater than necessary to accomplish the statute's legitimate purpose. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628-29 (1984). Accordingly, I rule that the nondiscrimination condition imposed by the public accommodations statute does not violate the Veterans' right to expressive association.[27]

[27] This is not to say, however, that the Parade can never become a protected First Amendment activity. It simply has not been one in the past and is not one now.

In seeking permanent injunctive relief, GLIB asks that the court not renew the conditions on its participation which accompanied the preliminary injunction of February 22, 1993.[28] GLIB's participation in the 1992 and 1993 Parades was peaceable and orderly. Moreover, except for reiterating unsubstantiated concerns, neither the Veterans nor the City has shown that conditions applicable only to GLIB should be imposed.[29]

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[28] The conditions were:

> "1. No more than twenty-five (25) individuals ("the Group") will march.
> 2. Each such individual shall wear a readily identifiable badge or insignia indicating membership in the Irish-American Gay, Lesbian and Bisexual Group of Boston, which insignia shall be made known to the parade authorities and the Boston Police officer in charge of parade security no less than five (5) hours before the scheduled start of the parade.
> 3. All terms and conditions with [*sic*] bind all other parade participants shall bind the group.
> 4. The group shall display a single cloth banner carried at waist level.
> 5. The group's members shall carry no placards or posters other than the banner nor any other written material.
> 6. No group member, individually or in concert with any other or others, shall distribute by any manner or means any pamphlet, object or material of any kind whatsoever.
> 7. The group shall cooperate with and obey the appropriate orders of any Boston Police Department officer on duty in or about the vicinity of the parade.
> 8. All members of the group shall conduct themselves in a peaceful and orderly manner, with due regard for the public's safety.
> 9. Violation of any of the foregoing terms will constitute grounds for an automatic and immediate revocation of the right to march of both the individual or the group as a whole.
> 10. Any dispute with respect to any term of this Order shall be decided on the spot by the Officer in Charge of the Community Disorders Unit of the Boston Police Department or his designated representative; and if he designates a representative, such designee is to be made known no later than five hours before the scheduled start of the Parade to Plaintiffs Timothy Daley and/or Cathleen Finn and to Defendant John J. Hurley (and/or his designated representative)."

*Irish-American Gay, Lesbian and Bisexual Group of Boston* v. *City of Boston*, Civ. No. 92-1518A (Suffolk Super. Ct. Feb. 22, 1993, Zobel, J.).

[29] The disruption caused by spectators cannot be a basis for refusing GLIB's request. *See Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Invisible Empire of the Knights of the Ku Klux Klan* v. *Thurmont*, 700 F.Supp. 281, 285 (D.Md. 1988).

Of course, GLIB is not entitled to special benefits, but neither should it be subject to special burdens. Therefore, I hold that GLIB is entitled to participate in the Parade on the same terms and conditions as other participants. *See Invisible Empire of the Knights of the Ku Klux Klan* v. *Thurmont*, 700 F.Supp. 281, 285-86 (D.Md. 1988) (enjoining the imposition of conditions on KKK march where no evidence of disruption by marchers).

In their cross-claim against the City, the Veterans allege that by seeking judicial clarification of the prior court order for the 1993 Parade, and by conceding the applicability of certain anti-discrimination laws, the City violated the Veterans' rights to freedom of speech, association, assembly, free exercise of religion, and equal protection of the laws in violation of the First and Fourteenth Amendments to the United States Constitution, and Articles 1, 12, 16 and 19 of the Massachusetts Declaration of Rights (Count I). Furthermore, the Veterans contend that the City's initial rejection and subsequent delay in issuing the Veterans a parade permit, along with the City's aforementioned actions, interfered with the Veterans' constitutional rights in violation of G.L. c. 12, §§ 11H and 11I (Count II). The Veterans seek a permanent injunction prohibiting the City from attempting to control the content of the Veterans' speech embodied in any future parades.

As explained above, the Veterans' Parade is not an exercise of their constitutionally protected right of expressive association. It is an open recreational event that is subject to the public accommodations law. Therefore, the City's gestures toward compliance with that law did not violate the constitutional rights of the Veterans. Similarly, with respect to G.L. c. 12, §§ 11H and 11I, the Veterans do not have a right to exclude GLIB that is "secured by the constitution or laws of the United States, or . . . the commonwealth." Therefore, the Veterans do not have a claim against the City for interference with their

exercise of such a right. Moreover, even if the Veterans were correct about their rights, the City's mistake of law about GLIB's rights and those of the Veterans would not constitute the "threats, intimidation or coercion" proscribed by the Massachusetts Civil Rights Act, c. 12, § 11H. *Layne* v. *Superintendent*, 406 Mass. 156, 158 (1989).

In summation: "the Veterans exclusion of GLIB from the St. Patrick's/Evacuation Day Parade violates G.L. c. 272, §§ 92A and 98, the public accommodations law; absent state action, the exclusion does not violate GLIB's rights under the Federal Constitution; the broadly inclusive Parade is not constitutionally protected expressive association; the Veterans' cross-claims that the City has violated their constitutional and statutory rights are meritless; GLIB's motion for an order authorizing its participation in the Parade subject to generally applicable terms and conditions will be allowed.

History does not record that St. Patrick limited his ministry to heterosexuals or that General Washington's soldiers were all straight. Inclusiveness should be the hallmark of their Parade.

## ORDER

For the foregoing reasons, it is herey ADJUDGED that the Defendant Veterans Council violated the plaintiffs' (GLIB's) rights to be free from sexual orientation discrimination in a place of public accommodation, resort, or amusement in violation of G.L. c. 272, §§ 92A and 98. It is therefore DECREED that the defendant Veterans Council is permanently enjoined from preventing plaintiff GLIB from participating in the St. Patrick's/Evacuation Day Parade because of the group members' sexual orientation. The preliminary injunction issued on February 22, 1993 is hereby DISSOLVED. The plaintiff may submit a proposed permanent injunction, preferably by agree-

ment as to form. It is further ORDERED that the defendant Veterans Council shall allow plaintiff GLIB to participate in the Parade in the same manner and under the same terms and conditions applicable to all other participants in the Parade.

J. Harold Flannery
Justice of the Superior Court

DATED: December 15, 1993

## APPENDIX C.

## 418 Mass. 238

# IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON & others,[1]

*v.*

# CITY OF BOSTON & others.[2]

Supreme Judicial Court of Massachusetts, Suffolk.

Argued March 10, 1994.

Decided July 11, 1994.

Irish-American gay, lesbian and bisexual group sought to march in Boston's St. Patrick's Day-Evacuation Day Parade, and parade organizers refused. The Superior Court, Suffolk County, J. Harold Flannery, J., granted permanent injunctive relief to group, and organizers appealed. The Supreme Judicial Court, Liacos, C.J., held that: (1) organizers violated public accommodation law, which prohibits discrimination based on sexual orientation in public places, by not allowing group to march, and (2) public accommodation law did not violate organizers' First Amendment rights.

So ordererd.

Nolan, J., dissented with opinion.

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[1] Timothy Daley, Barbra Kay, and Cathleen Finn, individually and on behalf of other members of the Irish-American Gay, Lesbian and Bisexual Group of Boston.

[2] South Boston Allied War Veterans Council and John J. "Wacko" Hurley, individually and as a representative member of the Council.

**1. Civil Rights 119.1**

Boston's St. Patrick's Day-Evacuation Day Parade fell within scope of public accommodation law which prohibits discrimination based on sexual orientation in admission to or treatment in any place of public accommodation, resort or amusement, and therefore parade organizers violated law by refusing to allow Irish-American gay, lesbian and bisexual group to march in parade, where parade occurred on public city streets and provided entertainment, recreation, and amusement to participants and spectators, and almost any individual or group would be admitted to parade if they applied or showed up at start of parade and offered to make contribution to council organizing the parade. M.G.L.A. c. 272, §§ 92a, 98.

**2. Civil Rights 119.1**

**Constitutional Law 90.1(4)**

Application of public accommodation law, which prohibits discrimination based on sexual orientation, to Boston's St. Patrick's Day-Evacuation Day Parade, to allow Irish-American gay, lesbian and bisexual group to march in parade, did not violate parade organizers' First Amendment rights where parade organizers did not use parade for expressive purposes, but instead allowed participation by nearly every individual and group that wanted to participate. U.S.C.A. Const.Amend. 1; M.G.L.A. c. 272, §§ 92A, 98.

**3. Constitutional Law 90.1(4)**

Not every parade is per se an exercise of rights protected by First Amendment. U.S.C.A. Const.Amend. 1.

**4. Civil Rights 103**

**Constitutional Law 90.1(4)**

Public accommodation law, which, *inter alia*, prohibits discrimination based on sexual orientation in admission to or treatment in any place of public accommodation, resort or amusement, was not unconstitutionally vague and overbroad in that it allegedly reaches constitutionally protected speech where law, by its terms, did not reach speech or expression or association protected by First Amendment and did not allow judge or any public official to examine content of speech. U.S.C.A. Const.Amend. 1; M.G.L.A. c. 272, §§ 92A, 98.

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Chester Darling, Boston, for John J. Hurley & another.

Philip M. Cronin, Boston (Mary L. Bonauto, Portland, ME, with him), for plaintiffs.

Claudia Billings McKelway, Deputy Corp. Counsel (Krisna M. Basu, Asst. Corp. Counsel, with her), for the City of Boston.

Andrew J. McCauley, New York City, for Catholic League for Religious and Civil Rights, *amicus curiae*, submitted a brief.

George P. Napolitano, Special Asst. Atty. Gen., & Elizabeth S. Hendler, Boston, for Massachusetts Comm'n Against Discrimination, *amicus curiae*, submitted a brief.

Before LIACOS, C.J., and ABRAMS, NOLAN, O'CONNOR and GREANEY, JJ.

LIACOS, Chief Justice.

The defendants, South Boston Allied War Veterans Council (council)[1] and John J. "Wacko" Hurley (Hurley), appeal from

[1]The council is an unincorporated association consisting of members elected from various South Boston veterans' groups.

a judgment of the Superior Court dated December 24, 1993, which, among other things, granted permanent injunctive relief to the plaintiffs.[4] [5] On appeal, the defendants raise a myriad of issues: (1) whether the annual St. Patrick's Day-Evacuation Day Parade sponsored by the council and held in the South Boston section of Boston is speech protected by the First and Fourteenth Amendments to the United States Constitution and art. 1, as amended, art. 12, art. 16, as amended, and art. 19 of the Massachusetts Declaration of Rights; (2) whether the trial judge committed error when he "examined, evaluated and passed judgment on the content of the parade and deemed that content unworthy of constitutional protection, thereby enabling the court to apply statutory law to speech, in violation of the [council's] Federal and State [c]onstitutional rights of freedom of speech, expression, exercise of religion, assembly, and due process and equal protection of the laws, as enumerated in the First and Fourteenth Amendments [to] the United States Constitution, and arts. 1, 12, 16 and 19"; (3) whether a parade is a place of public accommodation, resort, or amusement under the public accommodation discrimination law, G.L. c. 272, §§ 92A, 98; (4) whether the judgment of the Superior Court constituted a "prior restraint of the [council's] Federal and State constitutional rights of freedom of speech, expression,

[4] Unless otherwise indicated, we use the term "defendants" to refer to the council and to Hurley, collectively. We acknowledge the assistance provided to us by the briefs of the amici, Massachusetts Commission Against Discrimination and the Catholic League for Religious and Civil Rights.

[5] We granted the defendants' application for direct appellate review. After oral argument on March 10, 1994, we issued an order on March 11, 1994, affirming the judgment of the Superior Court and noting that an opinion or opinions would follow. We did so upon the request of the city so that it could plan adequately for the public safety related to the parade, scheduled for March 20, 1994.

The order states: "ORDERED, that the following entry be made in the docket, *viz.*,—A majority of the Justices having concluded that there was no error below, the judgment of the Superior Court, dated December 24, 1993, is affirmed. Opinion or opinions to follow." On March 15, 1994, we denied the defendants' motion for stay of judgment and order. This opinion is issued to explain the basis for that order.

exercise of religion, assembly, and due process and equal protection of the laws as enumerated in the First and Fourteenth Amendments . . . and arts. 1, 12, 16 and 19"; (5) whether the issuance of a parade permit by operation of law converts a place of public accommodation to the exclusive use of the private permit holder; (6) whether the judgment of the Superior Court "should be reversed as to the liability of the City of Boston to the Veterans as the findings of fact by the trial judge were clearly **[241]** against the weight of the uncontroverted evidence"; (7) whether "the City of Boston, acting under color of law, [did] threaten, intimidate, coerce, deprive and interfere with the [council's] Federal and State rights of freedom of speech, expression, exercise of religion, assembly, and due process and equal protection of the laws as enumerated in the First and Fourteenth Amendments . . . and arts. 1, 12, 16 and 19 . . . and in violation of the Massachusetts Civil Rights Act, G.L. c. 12 [§§ 11H, 11I], 42 U.S.C. § 1983, City of Boston Traffic Rules and Regulations Art. VIII (as amended through January 2, 1988); and City of Boston Ordinance of 1984, c. 16 (as amended by [c.] 17 and [c.] 18"; (8) whether G.L. c. 272, §§ 92A and 92, are unconstitutionally overbroad and vague; and (9) whether the judgment of the Superior Court should be reversed because the "finding [of the trial judge] of discrimination [perpetrated by the council] was faulty in its reasoning, unsupported by the record, and against the weight of the evidence." We discuss those issues we deem relevant to this appeal.

We state the facts found by the trial judge.[6] In January, 1992, several individuals, including the plaintiff Barbra Kay, formed the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB). GLIB is a social organization consisting of individuals who are homosexual or bisexual and their support-

[6] The judge presided over a four-day bench trial at which twelve witnesses testified and 113 exhibits were admitted in evidence.

ers. GLIB was formed to march in the annual St. Patrick's Day-Evacuation Day Parade[7] held in South Boston. GLIB's purposes are to express its members' pride in their dual identities as Irish or Irish-American persons who are also homosexual or bisexual, to demonstrate to the Irish-American community and to the gay, lesbian, and bisexual **[242]** community the diversity within those respective communities, and to show support for the Irish-American homosexual and bisexual men and women in New York City who were seeking to participate in that city's St. Patrick's Day Parade.

GLIB submitted an application to the council to march in the 1992 parade. The council denied the application, citing "safety reasons and insufficient information regarding [the] social club." Ultimately, GLIB was allowed to march in the 1992 parade under court order, with several restrictions placed on its participation that were not applied to other participants in the parade.

The following year, GLIB sought permission to participate in the 1993 parade. The council refused to admit the group, asserting that the "decision to exclude groups with sexual themes merely formalized that the Parade expresses traditional religious and social values." The judge found that excluding groups with sexual themes was itself a form of discrimination in violation of the public accommodation law's prohibition against discrimination based on sexual orientation.

At trial, Hurley "equivocated about his reasons for excluding GLIB" but ultimately testified that he would never allow them to march in the parade.[8] The judge concluded that the inconsis-

[7] The judge noted Evacuation Day "commemorates General Washington's initial military victory over the British in 1776, and the British departure from South Boston. It is an officially recognized historical event in Massachusetts and a Suffolk County holiday. . . . The General Court of Massachusetts established Evacuation Day in 1938. *See* G.L. c. 6, § 12K."

[8] The judge noted that "Hurley speaks for the Veterans Council and he testified on its behalf. He indicated that the objection to GLIB's participation was based on the belief, although unsubstantiated, that its members were also members of ACT-UP

tent and changing explanations for excluding GLIB demonstrated the "pretextual nature" of those explanations. The judge found that GLIB was excluded from the parade because of the sexual orientation of its members. Based on our view of the record before us, we cannot say that this finding of the judge was clearly erroneous. Mass.R.Civ.P. 52(a), 365 Mass. 816 (1974). *Cox* v. *New England Tel. & Tel. Co.*, 414 Mass. 375, 384, 607 N.E.2d 1035 (1993).

**[243]** The judge concluded that the parade constitutes a public accommodation under G.L. c. 272, § 92A (quoted, *infra* at 1297). In arriving at that conclusion, the judge relied on the lack of selectivity exerted by the veterans over the parade's participants and sponsors and the parade's historical roots. The judge found that "[d]uring the first half of this century, the South Boston Citizens Association and the City of Boston organized the various Evacuation Day activities. In 1901, the City celebrated the 125th anniversary of Evacuation Day by a parade, artillery salute, concert, and fireworks display, among other events. In 1947 Mayor James Michael Curley granted the [council] authority to organize and conduct the Parade. Since that time, the City has annually granted the [council] a parade permit. No other applicant has applied for the permit.

"Over the years, the Parade has featured as many as 20,000 participants and as many as 1,000,000 spectators. In 1992, the Parade featured about 10,000 participants and 750,000 spectators. The 1993 Parade, postponed due to inclement weather, had fewer than 10,000 participants, about 400,000 spectators, and was aired live by Boston's community access cable television channel. The Parade is one of the six largest parades held in

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and Queer Nation. The group's potential for being disorderly was offered as a reason for excluding it. The defendant's final position was that GLIB would be excluded because of its values and its messages, *i.e.*, its members' sexual orientation.

Boston annually, and the largest New England event for Irish-Americans, their friends, and well-wishers."

The Parade has followed substantially the same route in South Boston for at least forty-seven years, "providing entertainment, amusement, and recreation to participants and spectators alike." The council has demonstrated a lack of selectivity in admitting participants and sponsors.[9] The judge **[244]** characterized the parade by noting that "the interests and viewpoints represented are truly catholic; commercial . . ., religious . . ., political . . ., eleemosynary . . ., patriotic . . ., moral . . ., theatrical . . ., athletic . . ., public service . . ., trade union . . ., and so on. Indeed, since 1947 the only groups that have been excluded from the Parade besides GLIB have been the Ku Klux Klan and ROAR (Restore Our Alienated Rights). Neither of these groups, however, is protected by G.L. c. 272, §§ 92A and 98."[10]

[9]The following, among others, sponsored or participated in the 1992 parade: Raytheon Corporation (Patriot Missile); Hallamore, Clydesdale Horses; radio station 98.5 Mix FM; Boston municipal police department; Irish basketball players; South Boston resident group; Massachusetts Bay Transportatio Authority color guard; "McGruff the Crime Dog"; South Boston Against Drugs (SOBAD); Marion Manor Nursing Home; National Parks Service; South Boston Baptist "Bible Trolley"; Vietnam Era Veterans; Princeman singing group; Leukemia Society; City Councillors Rosaria Salerno, Albert "Dapper" O'Neil and John Nucci; radio station WZOU 94.5 FM; Houlihan's restaurant; Amrheins restaurant; Irish Mist restaurant; Shuberts Smoke Shop; Hub Video; Miss South Boston; Miss Ice-O-Rama; Miss Junior Ice-O-Rama; Lexington Minutemen; AFL-CIO; various high school bands; NORAID (Northern Ireland Aid); Massachusetts Citizens for Life; "Joey Clowns" of Salem, New Hampshire, and radio stations WZLX FM and WAAF.

In addition to many of the above, the following and others sponsored or participated in the 1993 parade: Boston Bruins hockey club, Massachusetts Port Authority, Budweiser beer, Mt. Washington Bank, Pepsi Cola, several candidates for city council, various State representatives and senatore, the "Cycling Murrays," Citizens Committee for JFD Day, Massachusetts Water Pollution Control Association, South Boston Savings Bank, all declared and undeclared mayoral candidates in Boston; and others.

[10]ROAR was excluded because of its antibusing message. The judge made no finding as to why the Ku Klux Klan was excluded.

The council argues that the Massachusetts Right to Life group and a truck carrying antihomosexual signs also were excluded, and that the message of NORAID was limited. Assuming this to be true, we perceive no legal relevance of this fact to the findings of the judge or to the conclusion we reach.

Additionally, the judge found that there are no written procedures, criteria, or standards for selecting participants or sponsors of the parade. Participants from previous parades are sent an application for the upcoming parade. Those who have not previously participated and who inquire about participation in the upcoming parade are sent applications. Some groups receive reimbursement for their parade-related expenses. The council votes on applications for participation in "batches," and the council generally does not inquire into the message or views of each applicant.[11]

**[245]** Certain groups or individuals have been allowed to participate in the parade even if they have not submitted an application prior to the parade. In 1993, members of the Boston Bruins hockey club merely showed up at the start of the parade and were permitted to march, without having filed an application. Others, such as the Massachusetts Water Pollution Control Association and several mayoral candidates, gained entrance by making a contribution to the parade without filling out an application. The judge concluded that the procedures for admittance into the parade was not uniformly applied.

Based on the foregoing, the judge concluded that "it is impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment. . . . [T]he [council's] Parade is not an exercise of their constitutionally protected right of expressive association. It is an open recreational event that is subject to the public accommodation law. . . . [T]he [council's] exclusion of GLIB from the . . . Parade violates G.L. c. 272, §§ 92A and 98, the public accommodations law; absent state action, the exclusion does not violate GLIB's rights under the Federal Constitution; the broadly inclusive Parade is not constitutionally protected expressive asso-

[11] The judge found that, despite the formality of voting on applications by the council, decisions regarding participation are made by Hurley. The judge also found that, as to participation by GLIB, the council and Hurley are of the same opinion.

ciation; the [council's] cross-claims that the City has violated their constitutional and statutory rights are meritless."

The judge dismissed GLIB's claims against the city and entered judgment for the city on those claims.[12] The judge dismissed the council's cross claims against the city and entered judgment for the city on those claims. Finally, the judge issued the following order: "The defendants South Boston **[246]** Allied War Veterans Council, John J. "Wacko" Hurley, their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them who have actual notice of this Order: (a) are permanently enjoined from discriminating against the plaintiff on the basis of sexual orientation with respect to participation in the defendant's annual St. Patrick's/Evacuation Day Parade; (b) shall accommodate in the Parade in all respects representatives of the plaintiff on the terms and conditions generally applicable to all other Parade participants."

**[1]** The plaintiffs invoked and the judge essentially relied on the public accommodation law, G.L. c. 272, §§ 92A and 98. Among the prohibitions in those sections is the prohibition against discrimination based on sexual orientation in the admission to or treatment in any place of public accommodation, resort or amusement. G.L. c. 272, § 93. "A place of public accommodation, resort or amustment" is "defined as and shall be deemed to include any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be (1) an inn, tavern, hotel, shelter, roadhouse, motel, trailer camp or resort for transient

[12] In their brief, the plaintiffs did not take issue with the dismissal of their claims against the city. The plaintiffs seek to raise this issue for the first time in a reply brief. It does not appear from the record that the plaintiffs filed a cross appeal, and therefore it is doubtful that they had the right to file a reply brief. Mass.R.App.P. 16(c), as amended, 399 Mass. 1217 (1987). Absent a cross appeal, the plaintiffs' claim of error on this issue is not properly before us.

or permanent guests or patrons seeking housing or lodging, food, drink, entertainment, health, recreation or rest; (2) a carrier, conveyance or elevator for the transportation of persons, whether operated on land, water or in the air, and the stations, terminals and facilities appurtenant thereto; (3) a gas station, garage, retail store or establishment, including those dispensing personal services; (4) a restaurant, bar or eating place, where food, beverages, confections or their derivatives are sold for consumption on or off the premises; (5) a rest room, barber shop, beauty parlor, bathhouse, seashore facilities or swimming pool, except such rest room, bathhouse or seashore facility as may be segregated on the basis of sex; (6) *a boardwalk or other public highway*; (7) an auditorium, theatre, music hall, meeting place or hall, including the commons halls of buildings; (8) *a place of public amusement, recreation, sport, exercise or entertainment*; (9) **[247]** public library, museum or planetarium; or (10) a hospital, dispensary or clinic operating for profit . . ." (emphasis supplied). G.L. c. 272, § 92A.

The judge ruled that the parade was a place of public accommodation within the ambit of § 92A. The language of § 92A itself and our case law require that the statute be given a broad and inclusive interpretation. *Concord Rod & Gun Club, Inc.* v. *Massachusetts Comm'n Against Discrimination*, 402 Mass. 716, 720, 524 N.E.2d 1364 (1988). *Local Fin. Co.* v. *Massachusetts Comm'n Against Discrimination*, 355 Mass. 10, 14, 242 N.E.2d 536 (1968). Section 92A itself specifically includes "a boardwalk or other public highway," G.L. c. 272, § 92A(6), and also includes "a place of public amusement, recreation, sport, exercise or entertainment," G.L. c. 272, § 92A(8). The plain language of the statute shows that the St. Patricks Day-Evacuation Day Parade falls within the scope of the public accommodation law. The parade occurs on the public strees of South Boston. Nothing in § 92A or any other statute suggests

that a boardwalk or other public highway loses its character as a place of public accommodation, resort, or amusement, which it gains by operation of that statute, merely because a parade is conducted there. Given that the statute is remedial and was intended to be interpreted broadly and inclusively, *Concord Rod & Gun Club, Inc., supra*, such a narrowing interpretation would be contrary to the intent of the Legislature which we have heretofore perceived.

In addition, the judge found that the parade provides entertainment, recreation, and amusement to the participants as well as to the spectators, and that, in essence, almost any individual or group would be admitted to the parade if they either apply or show up at the start of the parade and offer to make a contribution to the council.[13] We cannot say, **[248]** based on the evidence in the record before us, that these findings by the trial judge were clearly erroneous. *See* Mass.R.Civ.P. 52(a); *Cox* v. *New England Tel. & Tel. Co.*, 414 Mass. 375, 384, 607 N.E.2d 1035 (1993). Thus, the parade additionally falls within the public accommodation law under G.L. c. 272, § 92A(8).[14]

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[13]The defendants argue that, by operation of law, issuance of a parade permit closes the streets of the parade route to the public. We need not decide whether that is true. The findings of the judge suggest that virtually any member or group drawn from the public may apply or pay to enter the parade. Thus, while spectators along the route during the parade cannot join the parade, they most likely would have been able to join if they had applied or appeared at the start of the parade and paid a fee. Under the defendants' reasoning, a restaurant which admits only diners who have made reservations or those who generously tip the maitre d' would be exempt from the public accommodation laws. Such a result would be contrary to the purposes of the public accommodation laws. *See Concord Rod & Gun Club, Inc., supra.*

[14]The defendants argue that, since the parade is an event rather than a fixed, physical location, it is not a "place" as required by G.L. c. 272, §§ 92A and 98. The common meaning of the word indeed has physical connotations, but it also has temporal connotations as well. *See Webster's Third New Int'l Dictionary*, 1727 (1961). In light of the remedial nature of this statute, and the Legislature's intention that it be it be interpreted broadly and with an eye toward inclusiveness, we cannot adopt the restrictive definition of "place" advanced by the defendants. *Concord Rod & Gun Club, Inc.* v. *Massachusetts Comm'n Against Discrimination*, 402 Mass. 716, 720, 524 N.E.2d 1364 (1988). *Local Fin. Co.* v. *Massachusetts Comm'n*

**[2]** The defendants assert that the public accommodation law, as applied to the parade, violates their rights under the First Amendment to the United States Constitution.[15] In discussing **[249]** the First Amendment rights of the defendants, the judge referred to their right of expressive association. *See generally Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 544-49 (1987). On appeal, the defendants argue that their right to freedom of speech was implicated and that this right, *see generally Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 152 (1969), not their right of expressive association, was the operative right in this case. For the purposes of this case, however, we need not decide whether the free speech rights or the expressive association right, or both, might be implicated by the factual situation asserted by the defendants. This is so because, as the judge found, it is "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment."[16]

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*Against Discrimination*, 355 Mass. 10, 14, 242 N.E.2d 536 (1968). *See United States Jaycees* v. *Massachusetts Comm'n Against Discrimination*, 391 Mass. 594, 611-12, 463 N.E.2d 1151 (1984) (Abrams, J., concurring in part and dissenting in part, with whom Hennessy, C.J., and Liacos, J., joined).

The defendants' reliance on the majority opinion in *United States Jaycees*, is misplaced. In that case, the organization was found not to be a place of public accommodation because it maintained no physical place of operations in Massachusetts. *United States Jaycees*, *supra* at 603, 463 N.E.2d 1151. It cannot be said of the parade that it is not associated with some physical place or location in Massachusetts.

[15] The defendants attempt to invoke the free speech and associational rights guaranteed by the Constitution of the Commonwealth. Aside from referring to our Constitution in the argument headings of their brief, however, the defendants make no separate argument under our Constitution. Accordingly, the defendants have waived those issues and we do not address them. Mass.R.App.P. 16(a)(4), as amended, 367 Mass. 921 (1975). Similarly, the defendants do not argue in their brief as to their asserted rights under the religious freedom and equal protection provisions of either the Massachusetts or the Federal Constitution. We do not address those issues. *Id.*

[16] To be clear, the inquiry focuses on the rights of the members of the council and whether they exercised those rights through the parade, not on the rights of the parade or the parade participants.

**[3]** The defendants assert that a parade is a "pristine form of speech," and refer us to *New York County Bd. of Ancient Order of Hibernians* v. *Dinkins*, 814 F.Supp. 358 (S.D.N.Y. 1993) (*Hibernians*), among other cases. That case involved a group of homosexuals and bisexuals who wanted to march in the New York City St. Patrick's Day Parade. *Id.* at 360-61. At the outset, we noted that *Hibernians* is distinguishable from the facts of this case because in *Hibernians*, the judge found that the Ancient Order of Hibernians in fact had used the parade as a means of expression, that the admission process was selective, and that it had adopted rules to prevent parade participants from using that parade as a forum to express views inconsistent with the views of the Ancient Order of Hibernians or the Roman Catholic Church. *Hibernians*, *supra* at 361-62, 367.[17] Such is not the case here. Furthermore, "contrary to the assumption of the defendants, not every **[250]** parade is per se an exercise of those rights protected by the First Amendment. *Shuttlesworth* v. *Birmingham*, *supra* ('parading *may* nonetheless *constitute* [a] method[ ] of expression entitled to First Amendment protection' [emphasis supplied]).[18]"

In order to rely on the protections of the First Amendment for speech or expressive association, the defendants initially had to demonstrate that the parade truly was an exercise of those First Amendment rights. *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). This, the judge found, they did not do.

[17] We also note that the New York parade celebrates only St. Patrick's Day, while the Boston parade celebrates, in addition, Evacuation Day. *See New York County Bd. of Ancient Order of Hibernians* v. *Dinkins*, 814 F.Supp. 358, 368-69 (S.D.N.Y. 1993). It was partly on this basis that the judge characterized the Boston parade as a "public event."

[18] We note also that we uphold the findings and rulings of the judge based on the record before us, particularly the history and nature of the parade here in issue. We do not suggest that every parade is nonexpressive or that every parade is necessarily a place of public accommodation. Rather, we base our conclusions on the unique nature of the facts found as to the parade in controversy.

"In arguing for reversal, the defendants point to evidence in the record suggesting that the parade did have an intended message (*i.e.*, that the parade was intended as an expressive vehicle). This evidence and other extensive evidence, including a videotape of the 1993 parade, however, were before the judge when he made his decision, and we assume that he considered all the evidence. It was for the judge to assign the appropriate weight and credibility to the evidence presented to him. The defendants failed to demonstrate and, on our own review of the record, we could not conclude that the findings of the judge were clearly erroneous." Mass.R.Civ.P. 52(a). *Cox* v. *New England Tel. & Tel. Co.*, *supra*.[19]

**[251]** We conclude, therefore, that the judge committed no error when he found that the defendants discriminated against the plaintiffs because of the plaintiffs' sexual orientation in refusing to admit them into the parade, which is a place of public accommodation. Likewise, there was no error in his finding that the parade was not used by the council for expressive pur-

[19] The dissent suggests that the finding of the judge that the parade did not have an expressive purpose was clearly erroneous because the parade provides entertainment to the spectators. Aside from the fact that the defendants themselves did not assert this as evidence of an expressive purpose, we are puzzled by the dissent's assertion, without citation, that the mere provision of entertainment would transform the parade into an expressive event. This assertion is especially puzzling in light of the detailed and exhaustive discussion by the judge of the evidence which led him to conclude that the parade was a civic, nonexpressive celebration. *Cf. Augat, Inc.* v. *Aegis, Inc.*, 417 Mass. 484, 497, 631 N.E.2d 995 (1994) (Nolan, J., dissenting) (this court may not "ignore both the record and the trial judge's findings of fact by baldly 'assuming' facts on its own to reach an alternative conclusion which it feels is appropriate").

The dissent's reliance on *Wooley* v. *Maynard*, 430 U.S. 705, 715, 97 S.Ct. 1428, 1435, 51 L.Ed.2d 752 (1977), is misplaced. *Post* at 1302-03. The private automobile of a New Hampshire resident could not possibly be characterized as a public accommodation. Here, on the contrary, the judge found, we agreed, and the dissent assumes, that the parade is a public accommodation within the statute. Thus, the burden was on the defendants to demonstrate that they were exercising their First Amendment rights and as a result were entitled to exemption from the public accommodation laws. *See Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984).

poses, and that, as a result, the defendants could not cloak their discriminatory acts in the mantle of the First Amendment.

**[4]** The defendants argue that the public accommodation law, G.L. c. 272, §§ 92A and 98, is unconstitutionally vague and overbroad. It does not appear from the record, submitted by the defendants, that they raised these issues below. We shall address them nevertheless because the claim is of possible public significance and because we can dispose of them briefly.

The defendants argue that the public accommodation law is overbroad because it reaches constitutionally protected speech in that it allows the court to examine the content of speech with standardless discretion. This is not so. By their terms, G.L. c. 272, §§ 92A and 98, facially do not reach a speech or expression or association protected by the First Amendment. They do not allow a judge, or any public official, to examine the content of speech.[20] Now would we inter**[252]**pret those sections so that they could reach and unconstitutionally infringe on speech. *Cf. R.A.V.* v. *St. Paul, Minn.*, ___ U.S. ___, ___, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992); *Forsyth County, Ga.* v. *Nationalist Movement*, ___ U.S. ___, ___, 112 S.Ct. 2395, 2401-2402, 120 L.Ed.2d 101 (1992); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 36 L.Ed.2d 830 (1973).[21] We already have concluded that, in this case, the public accommodation law did not infringe on the defendants' First Amendment rights.

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[20] Contrary to the defendants' assertion, the judge did not inquire into the content of speech in this case. Instead, he examined whether there existed speech or any other activity protected by the First Amendment. That he permissibly can, and must, do. *See United States* v. *O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968) (not all conduct is protected speech even if so labeled by the actor); *Clark, supra*, 468 U.S. at 293 n.5, 104 S.Ct. at 3069 n.5 (one seeking relief under First Amendment must show that he is entitled to it, since there is no presumption of expressiveness).

[21] We leave open for an appropriate case the question whether the public accommodation law permissibly could be applied to a genuine exercise of First Amendment rights. *See R.A.V.* v. *St. Paul, Minn.*, ___ U.S. ___, ___, 112 S.Ct. 2538, 2542, 2548, 120 L.Ed.2d 305 (1992).

The defendants' vagueness argument is that " 'men of common intelligence must necessarily guess at [the] meaning [of the public accommodation law].' *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 [46 S.Ct. 126, 127, 70 L.Ed. 322] (1926)." The defendants argue this is true, because three State judges (two in the Superior Court and one in the Appeals Court) have interpreted the statutes as reaching parades and one Federal judge has suggested that the statute was ambiguous.

We note that the judges mentioned by the defendants did not find that the statute applied to parades in general, but rather to the St. Patrick's Day-Evacuation Day Parade in particular, because of the unique characteristics of the parade. The defendants' argument rests on the assumption that the statute reaches their speech. The judge below found and we have affirmed, however, that the defendants did not prove that they truly were exercising First Amendment rights. Thus, their vagueness argument fails because it rests on a faulty assumption. Furthermore, the public accommodation law gives persons of ordinary intelligence a reasonable opportunity to know what is prohibited, provides standards to those who must enforce those laws, and does not inhibit the valid exercise of First Amendment rights. *See Grayned* v. *Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972).

**[253]** Because the defendants had no right to discriminate against members of GLIB, by operation of logic the city could not possibly have interfered with or infringed on any of their rights as asserted by the defendants. Thus, the judge properly dismissed the defendants' cross claims against the city.

NOLAN, Justice (dissenting).

Today will be regarded as a sad and frustrating day in the history of the First Amendment to the United States Constitution. Today, a majority of this court upholds, and thereby endorses, a trial judge's flagrant violation of the free speech

rights of citizens of this Commonwealth. The majority acquiesces in a judge's order instructing a private group that if it wishes to express itself at all, it must include in its expression a particular idea, one with which the group does not agree. One must strain to recall or even to imagine such an obvious violation of the revered right to free speech.

The majority upholds a Superior Court judge's decision that the South Boston Allied War Veterans Council's (Veterans Council) exclusion of the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) from the St. Patrick's Day-Evacuation Day Parade violates GLIB's members' statutory right to be free from discrimination on the basis of their sexual preference in place of public accommodation, and that the application of the statute to the facts of this case does not violate the Veterans Council's rights under the First Amendment. It is because I conclude that the Veterans Council's rights were violated by the judge's decision and order compelling it to allow GLIB to march and express its message in the Veterans Council's parade that I dissent from the decision of the majority.

1. *G.L. c. 272, §§ 92A, 98.* The majority finds no error in the judge's determination that the conduct of the Veterans Council in excluding GLIB from its parade violates the Commonwealth's accommodation law, G.L. c. 272, §§ 92A, 98. I do not fully concur with the judge's reasoning in determining the applicability of the statute. Further, for **[254]** reasons discussed, *infra*, I do not agree that the judge's findings support his conclusion that the conduct of the Veterans Council violated the statute, even if it otherwise applies. I reserve extended discussion on these matters, however, and proceed to issues concerning rights under the First Amendment. I shall assume for the purpose of the following discussion that the statute applies to the conduct of the Veterans Council.

2. *First Amendment.* The judge limited his discussion of the First Amendment to the freedom of expressive association.

He ruled that the freedom of speech was not at issue. This determination is erroneous. The defendants' freedom of speech is certainly at issue in this case — and was properly raised and argued[1] — and is violated by the judge's application of G.L. c. 272, §§ 92A, 98.

a. *Freedom of speech.* The First Amendment to the Constitution of the United States reads, in part: "Congress shall make no law . . . abridging the freedom of speech." Through the Fourteenth Amendment to the United States Constitution, the First Amendment limitation on Congress' power to legislate is applied to the legislative power of the States. *Wallace* v. *Jaffree*, 472 U.S. 38, 49-49, 105 S.Ct. 2479, 2485, 86 L.Ed.2d 29 (1985). Further, "[t]hat the action of state court and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established." *Shelley* v. *Kraemer*, 334 U.S. 1, 14, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948). Thus, it is as constitutionally objectionable for a judge sitting in a court of this Commonwealth to issue an order improperly "abridging the freedom of speech," as it is for Congress to enact a law doing the same.

As a general proposition, the State acts within its power when it enacts reasonable "time, place and manner" regula**[255]**tions which affect speech of expression. *Cox* v. *New Hampshire*, 312 U.S. 569, 576, 61 S.Ct. 762, 766, 85 L.Ed. 1049 (1941) ("If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets"). Conversely,

[1] The Veterans Council presented argument on the freedom of speech throughout the proceedings in this case. In particular, argument on the issue was presented at trial, in the defendants' memorandum in support of proposed findings of facts and proposed conclusions of law, and in the defendants' briefs on appeal.

restrictions on the content of speech are generally improper. *See Riley* v. *National Fed'n of the Blind of N.C.*, 487 U.S. 781, 798, 108 S.Ct. 2667, 2678, 101 L.Ed.2d 669 (1988) ("[The State's] content-based regulation is subject to exacting First Amendment scrutiny"); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448 (1975), *quoting Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963) ("Any system of prior restraint . . . 'comes to this Court bearing a heavy presumption against its constitutional validity' "); *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972) ("government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views"). The freedom of speech comprises both the right to speak and the right to refrain from speaking. *Riley, supra*, 487 U.S. at 795, 108 S.Ct. at 2626. *Wooley* v. *Maynard*, 430 U.S. 705, 715, 97 S.Ct. 1428, 1435, 51 L.Ed.2d 752 (1977). Thus, "[t]he First Amendment protects the right of individuals . . . to refuse to foster . . . an idea they find morally objectionable." *Wooley, supra*. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley, supra*.

In the present case, the judge's decision and order requires the Veterans Council to allow the members of GLIB to march in the parade as an identifiable group.[2] As noted by the judge and the majority, GLIB's organizational purposes are expressive in nature; to express its members' pride in their sexual preference; to demonstrate to the community the **[256]** diversity which exists therein; and to show support for homosexuals

[2] The judgment states in part: "[The defendants] shall accommodate in the Parade in all respects representatives of [GLIB] on the terms and conditions generally applicable to all other Parade participants." His decision makes clear that this entails allowing the members of GLIB to march in a group, identifying themselves as members of the group, and identifying the group through a banner.

and bisexuals in New York who sought to march in a St. Patrick's Day Parade in New York City. The Veterans Council, as license holder of the St. Patrick's Day-Evacuation Day Parade, determines who marches in the parade. Except for GLIB, there would be no group marching in the parade whose message supports homosexuality or bisexuality. Therefore, the judge's decision and order permitting GLIB to march as an identifiable group results in GLIB's message being added to the parade. This is "[m]andating speech that [the Veterans Council] would not otherwise make," and is thus content-based regulation. *Riley, supra.*

Supreme Court cases concerning content-based regulation of speech examine such regulation with a strict scrutiny, or "exacting" scrutiny standard. *See, e.g., Riley, supra*, 487 U.S. at 798, 108 S.Ct. at 2678; *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n of Cal.*, 475 U.S. 1, 19-20, 106 S.Ct. 903, 913, 89 L.Ed.2d 1 (1986); *Wooley, supra*, 430 U.S. at 716, 97 S.Ct. at 1436. If we assume that evisceration of discrimination on the basis of sexual preference is a compelling State interest, the judge's action in this case is not narrowly tailored to attaining that end: "[T]he State can serve that interest through means that would not violate [defendants'] First Amendment rights." *Pacific Gas & Elec. Co., supra*, 475 U.S. at 19, 106 S.Ct. at 913. To compel the Veterans Council to express GLIB's message is not narrowly tailored to the State's interest. It unnecessarily hampers the free speech of the Veterans Council. It goes beyond merely regulating discriminatory conduct, and requires a private group, the Veterans Council, to promote GLIB's ideals. This is unconstitutional: "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley, supra*, 430 U.S. at 717, 97 S.Ct. at 1436.

It is important to note that the Veterans Council does not need a narrow or distinct theme or message in its parade for it to be

protected under the First Amendment. Both the judge and the majority try to illustrate that the parade is a public celebration with no distinct, unified theme; the impli**[257]**cation is that it is not expressive activity, and is therefore not worthy of First Amendment protection. This analysis is erroneous for two reasons. First, regardless of whether the parade has one message, ten messages, or no message at all, if GLIB's particular message is not in the parade, it cannot constitutionally be forced on the Veterans Council. Thus, although an individual who drives his automobile may have no expressive purpose for doing so, the State cannot require him to foster a message while driving that he otherwise would not. *Wooley*, *supra* at 717, 97 S.Ct. at 1436 (violation of the First Amendment to require defendants to display "Life Free or Die" on their license plates). Second, the finding that the parade lacks an expressive purpose is clearly erroneous. The Veterans Council obtains a license, collects funds, and privately organizes the St. Patrick's Day-Evacuation Day Parade each year. They do so knowing that their efforts will provide entertainment to the hundreds of thousands of spectators who line the streets of the South Boston section of Boston to watch in celebration of St. Patrick's Day and Evacuation Day. The judge would have us believe that the Veterans Council and all the parade participants show up solely for their own entertainment, and that any entertainment of the viewing public is merely incidental.[1] This defies logic, yet is just one of many gaps in reason created by the trial judge's

[1]The judge relies on the Supreme Court case of *Dallas* v. *Stanglin*, 490 U.S. 19, 25, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989), wherein the Court ruled: "the activity of . . . dance-hall patrons — coming together to engage in recreational dancing — is not protected by the First Amendment." The case is inapposite. Unlike the participants in the Veterans Council's parade, patrons in the dance hall did not gather to dance for the purpose of entertaining others in celebration of a holiday. The parade is conducted for the entertainment of hundreds of thousands of people; the dance-hall patrons whose conduct was at issue in *Dallas*, did not gather for the purpose of entertaining others.

flagrant efforts to forego extending to the Veterans Council their deserved First Amendment rights.

The judge's order clearly violates the Veterans Council's freedom of speech.

b. *Freedom of association*. The judge determined, and the majority agreed, that the Veterans Council's First Amend-**[258]** ment freedom of expressive association is not unconstitutionally infringed by requiring GLIB to march as a groupo in the parade. I disagree.

The freedom of expressive association is the "right to associate for the purpose of engaging in those activities protected by the First Amendment — speech, [among others]." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 618, 104 S.Ct. 3244, 3249, 82 L.Ed.2d 462 (1984). Much like the related, broader freedom of speech, "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Id.* at 623, 104 S.Ct. at 3252, citing *Abood* v. *Detroit Bd. of Ed.*, 431 U.S. 209, 234-35, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261 (1977). Infringements on the right not to associate are examined under strict scrutiny; "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts* v. *United States Jaycees, supra*, and cases cited. It is established, however, that, "[i]f a club seeks to exclude individuals who do not share the views that the club's members wish to promote," the law may not require association. *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 13, 108 S.Ct. 2225, 2234, 101 L.Ed.2d 1 (1988).

As discussed above, the Veterans Council organizes the parade for expressive purposes: to entertain the hundreds of thousands of spectators who view the parade each year in celebration of St. Patrick's Day and Evacuation Day. Again assuming, without deciding, that evisceration of discrimination

on the basis of sexual preference is a compelling State interest, State regulation in furtherance of this end must be narrowly tailored to attaining it. Thus, requiring the Veterans Council not to exclude the members of GLIB on the basis of their sexual preference may be a constitutionally valid infringement on the Veterans Council's rights; however, precluding the Veterans Council from disallowing the members of GLIB from expressing themselves as a group is not related to the State's interest, and is therefore unconstitutional. In other words, because the judge's decision and order require the Veterans Council to allow GLIB to express itself, they **[259]** violate the rule that, "[where] a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law [may] erect[ ] no obstacle to this end." *New York State Club Ass'n, supra.*

It is important to note that this case is distinguishable from those that involve exclusion of individuals whose message and protected status may be inseparable. For example, in *Invisible Empire of the Knights of the Ku Klux Klan* v. *Mayor, Bd. of Comm'rs, & Chief of Police of Thurmont*, 700 F.Supp. 281 (D.Md.1988), a private group comprising numerous African Americans sought to enforce agains the Ku Klux Klan (KKK) an antidiscrimination statute in an effort to participate in the KKK's planned parade. The Federal District Courtf determined that permitting the group to participate would be unconstitutional, as the mere presence of African Americans in the KKK's parade would frustrate the KKK's message of white separatism. *Id.* at 289. This is distinguishable from the present case: the mere presence of homosexuals or bisexuals in the parade likely would not frustrate any message of the Veterans Council. This is so because GLIB's message is separable from its members' status as homosexuals or bisexuals. Thus, the presence of homosexuals or bisexuals, not outwardly identifiable as such, in the parade would likely not affect any message of the Veterans

Council, while the presence of those same individuals marching as an identifiable group -- the Irish-American Gay, Lesbian and Bisexual Group of Boston — would.

As discussed above, mandating mere association in this case may be constitutional; mandating a message is not. At the very least, the judge's decision and order, insofar as it compels the Veterans Council to allow the members of GLIB to march and express themselves as a group in the Veterans Council's parade and violates the First Amendment.

3. *Other matters*. Aside from the the judge's improper refusal to address the issue of freedom of speech and his erroneous analysis of the issue of freedom of association, his decision and order includes other serious errors of law, reason, and fact which warrant discussion.

**[260]** "In his decision, the judge equates excluding a group on the basis of its message or values with exclusion on the basis of its members' sexual preference: 'The defendant's final position was GLIB would be excluded because of its values and its message, *i.e.*, *its members' sexual orientation*" (emphasis added). This is clear error, and may have led to a baseless finding that the Veterans Council discriminated on the basis of GLIB's members sexual preference. If the Veterans Council excluded GLIB because of its message, and not specifically because of its members's sexual preference, then the statute was not violated. *See* G.L. c. 272, § 92A. Indeed, overwhelming evidence exists throughout the record which indicates that GLIB was excluded because of its message, and not because of its members' sexual preference."[4] Conversely, the only

[4] There is no evidence in the record that the Veterans Council ever inquired into the sexual preference of any person intending to march in the parade, including the members of GLIB; there is no evidence that the Veterans Council ever excluded any homosexual or bisexual not a member of GLIB; the judge found that not all members of GLIB are homosexual or bisexual; there is evidence in the record that the Veterans Council would let the members of GLIB march without a banner identifying the group.

evidence which supports a finding of discrimination was that many of GLIB's members are homosexual and GLIB was excluded, and that the Veterans Council had, in the past, proffered different reasons for its decision to exclude GLIB.[5]

"Relatedly, the judge state that, even if the Veterans Council's assertion that it excluded GLIB wsa under a policy of excluding all sexual themes was true, '[e]xcluding all sexual themes . . . contravenes the First Amendment's prohibition on content-based restrictions.' This is a flagrantly erroneous statement of law. The judge found that there was no State action here; certainly private parties may exclude any topic **[261]** or theme they want from their expression. This statement is an example of quintessential content-based regulation of speech which is plainly prohibited by the First Amendment, and it illustrates the confused understanding of the First Amendment by the judge and by this court, through its acquiescence."

4. *Conclusion.* That the judge's decision and order requiring the Veterans Council to allow GLIB to march and to express itself as a group is a flagrant violation of the Veterans Council's First Amendment rights is an unavoidable conclusion. The judge's crude regulation of the content of the Veterans Council's speech is epitomized by the last sentence of his decision: "Inclusiveness should be the hallmark of [the Veterans Council's] parade."

We have never been in the busineess of protecting only internally consistent, narrowly focused, politically sensitive speech. It is a travesty that we today vacate this precedent. Our holding today, while, to some, seemingly pushes us forward, really pushes us back over 200 years, to an era that lacked the protection guaranteed by the First Amendment. I dissent.

---

[5] It is important to note that each of the reasons for excluding GLIB proffered by the Veterans Council is not discriminatory. At various times throughout the past years, the Veterans Council proffered the following reasons for excluding GLIB: the Veterans Council was not provided with enough information about GLIB on its application; it was concerned with the safety of the group's members and the members of the public; and it excluded all sexual themes from the parade.

## APPENDIX D.

**Supreme Judicial Court for the**
**Commonwealth of Massachusetts**
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RE: No. SJC-06498

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON & others
vs.
CITY OF BOSTON vs. SOUTH BOSTON ALLIED WAR VETERANS COUNCIL & another

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied.

Very truly yours,

_____
Jean M. Kennett, Clerk

Dated: July 26, 1994

To: Mary Lisa Bonauto, Esquire
John P. Ward, Esquire
Gretchen Van Ness, Esquire
Philip M. Cronin, Esquire
Claudia B. McKelway, Ass't Corp. Counsel
Chester Darling, Esquire
George P. Napolitano, Special A.A.G.
Elizabeth S. Hendler, Esquire
Andrew McCauley

FILED
NOV 23 1994
OFFICE OF THE CLERK

No. 94-749

# In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHN J. HURLEY, INDIVIDUALLY, AND
THE SOUTH BOSTON
ALLIED WAR VETERANS COUNCIL,
PETITIONERS,

*v.*

IRISH-AMERICAN GAY, LESBIAN AND
BISEXUAL GROUP OF BOSTON,
AN UNINCORPORATED ASSOCIATION BY AND THROUGH,
TIMOTHY DALEY, BARBRA KAY AND CATHLEEN FINN,
ACTING ON THEIR OWN BEHALF AND ON BEHALF OF
MEMBERS OF THE ASSOCIATION,
RESPONDENTS.

## ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

## RESPONDENT'S BRIEF IN OPPOSITION

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# In the
# Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-749

JOHN J. HURLEY, INDIVIDUALLY, AND
THE SOUTH BOSTON
ALLIED WAR VETERANS COUNCIL,
PETITIONERS,

*v.*

IRISH-AMERICAN GAY, LESBIAN AND
BISEXUAL GROUP OF BOSTON,
AN UNINCORPORATED ASSOCIATION BY AND THROUGH,
TIMOTHY DALEY, BARBRA KAY AND CATHLEEN FINN,
ACTING ON THEIR OWN BEHALF AND ON BEHALF OF
MEMBERS OF THE ASSOCIATION,
RESPONDENTS.

## ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

## RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Irish-American Gay, Lesbian and Bisexual Group of Boston, ("GLIB"), respectfully requests that this Court deny the petition for Writ of Certiorari seeking review of the opinion of the Supreme Judical Court of the Commonwealth of Massachusetts in this case. The opinion is reported at 418 Mass. 238 (1994) and appears in the Petition for Writ of Certiorari at Appendix C1.

## Reasons Why the Petition Should be Denied

### I. The Petition Should Be Denied Because This Case Presents No "Special and Important Reasons" Warranting the Exercise of This Court's Extraordinary Jurisdiction.

Rule 10.1 of the Rules of the Supreme Court of the United States provides that a writ of certiorari will be granted "only when there are special and important reasons therefor." At issue in this case is the decision of the Massachusetts Supreme Judicial Court upholding the trial court's finding that Boston's annual Evacuation Day/St. Patrick's Day Parade is a place of public accommodation under state law, and upholding the trial court's finding that the Petitoners discriminated against the Respondents on the basis of sexual orientation in violation of state law by excluding them from this public celebration.

Nothing about this state-law decision makes it "special and important" under Rule 10.1. The decision fully comports with the binding precedent of this Court, as well as the well-settled principles guiding application of the public accommodations law in Massachusetts. In addition, the decision is fully supported by the facts adduced at trial, which were closely scrutinized by the Supreme Judicial Court. For the reasons discussed more fully below, this Court should decline to exercise its extraordinary jurisdiction in this case.

#### 1. *The Decision of the Massachusetts Supreme Judical Court Presents No Conflict with the Decisions of Any Other State or Federal Court*

Pursuant to Rule 10.1(b)[1] of the Rules of the Supreme Court, a writ of certiorari may be granted when a state court "has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United

[1] Subsection (a) of Rule 10.1 does not apply in this case.

States court of appeals." The decision of the Massachusetts Supreme Judicial Court presents no conflict with the decision of any other high court and it presents no conflict with any decision of a United States Court of Appeals. Petitioners attempt to create a conflict by reaching for the 1993 decision of the United States District Court of the Southern District of New York in *New York Board of Ancient Order of Hibernians* v. *Dinkins*, 814 F. Supp. 358 (S.D.N.Y. 1993),[2] but even a cursory examination of that decision shows that the two cases are inapposite.

In the *Dinkins* case, the District Court, based upon the parties' agreed statement of uncontested facts, made detailed factual findings regarding the following: the history and composition of New York City's St. Patrick's Day Parade (A6-A7); the identity of the Parade's sponsor ("The AOH is an organization comprised of Roman Catholic men of Irish descent . . ." A6); the financing of the Parade ("The AOH and the Parade Committee privately finance the Parade exclusively by means of private donations." (A6); the theme of the Parade ("The Parade celebrates, *inter alia*, freedom and Irish culture and heritage." (A7); the application process ("The AOH has adopted rules for the Parade to prevent any group or person from using the Parade as a vehicle or forum to pursue any . . . agenda inconsistent with the message, values and viewpoint of the AOH, or . . . with the teachings of the Roman Catholic Church." (A7-A8); the nature of the holiday commemorated by the Parade (St. Patrick's Day) (A6-A7); the Parade route ("For over seventy years the Parade has taken place on Fifth Avenue starting at 11:00 a.m. on the day of the Roman Catholic liturgical feast day of St. Partick." (A6); and the applicable law (A18-A25). Based on its analysis, the District Court concluded that New York's St. Partick's Day Parade is the expression of the Ancient Order of Hibernians and is, therefore, protected by the first amendment to the United States Constitution.

---

[2] Petition for Writ of Certiorari at Appendix A1.

In the *Irish-American Gay, Lesbian & Bisexual Group of Boston* case, the Supreme Judical Court upheld the trial court's detailed factual findings regarding the following: the history and composition of Boston's Evacuation Day/St. Patrick's Day Parade (C6-C8); the identity of the Parade's sponsors (the South Boston Allied War Veterans Council); the financing of the Parade ("Until 1993, the City provided approximately twenty-five percent of the Parade's total costs." (B17); the theme of the Parade ("[I]t is 'impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment.'" (C13); the application process ("there are no written procedures, criteria, or standards for selecting participants or sponsors of the parade." (C8); the nature of the holidays commemorated by the Parade ("The judge noted Evacuation Day 'commemorates General Washington's initial military victory over the British in 1776, and the British departure from South Boston. It is an officially recognized historical event in Massachusetts and a Suffolk County holiday . . .'" (C5 n.7); the Parade route ("The Parade has followed substantially the same route in South Boston for at least forty-seven years . . ." (C7); and the applicable law (C9-C16). Based on its close scrutiny of the facts found by the trial court, the Supreme Judicial Court determined that Boston's Evacuation Day/St. Patrick's Day Parade constitutes a place of public accommodation under Massachusetts General Laws c.272, sections 92A and 98, and it rejected the Petitioners' argument that the Parade was an exercise of their first amendment rights. (C14).

Both the District Court and the Massachusetts courts followed the applicable decisions of this Court in analyzing the asserted first amendment claims. *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968) (not all conduct is protected speech even if so labeled by the actor); *Clark* v. *Community for Creative Nonviolence*, 468 U.S. 288, 293 n.5 (1984) (one seeking protection under the first amendment must show that he is entitled to it, as there is no presumption of expressivness); see also *City of Dallas* v. *Stanglin*, 490 U.S. 17, (1989) (court may

properly test sincerity of first amendment claim but not the "truth" of protected content). That the two courts reached different conclusions is evidence of this simple fact: each Parade is unique and the two Parades are very different from the other.

In *Dinkins*, the District Court described the differences between the two Parades as follows:

> The Boston Parade celebrates not only St. Patrick's Day, but also Evacuation Day. Evacuation Day commemorates the March 17, 1776 departure of British troops from Boston. The parade conveys a general celebratory message in general support of 'traditional values.' . . . The fact that this 'traditional values,' multi-purpose parade requires 'detailed participation by city agencies in planning and execution' clearly illustrates the civic nature of the parade. . . . In light of these factors, the [Massachusetts] Court held that the defendant permit-holders were 'custodians of a civic celebration.'

(A23-24). The Massachusetts Supreme Judicial Court described the New York Parade as follows:

> At the outset, we noted that *Hibernians* is distinguishable from the facts of this case because in *Hibernians*, the judge found that the Ancient Order of Hibernians in fact used the parade as a means of expression, that the admission process was selective, and that it had adopted rules to prevent parade participants from using the parade as a forum to express views inconsistent with the views of the Ancient Order of Hibernians or the Roman Catholic Church.
>
> We also note that the New York parade celebrates only St. Patrick's Day, while the Boston parade celebrates, in addition, Evacuation Day.

(C13 & n.17).

Not every St. Patrick's Day Parade is identical. When the outcome of two cases is compelled by the unique facts of each case, there is no conflict within the meaning of Rule 10.1(b).

2. *No Federal Question is Presented in this Case, and the Decision of the Massachusetts Supreme Judicial Court Fully Comports with the Binding Precedent of this Court*

Rule 10.1(c) provides that a writ of certiorari may be granted when a state court decides "an important question of federal law which has not been, but should be, decided by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." The ruling of the Supreme Judicial Court could not be clearer. In this case the Commonwealth's court of last resort has not decided a federal question — it has properly determined the meaning of an important state statute: the Massachusetts public accommodations law. Massachusetts General Laws c.272, §§92A and 98. First enacted in 1865 and amended and expanded numerous times since that date, most recently in 1989 to prohibit discrimination on the basis of sexual orientation, the public accommodations statute embodies the Commonwealth's strong public policy against all forms of discrimination in places of public accommodation. The decisions of the Supreme Judicial Court recognizes this vital public policy and have directed a broad and inclusive reading of the statute. *Concord Rod & Gun Club* v. *Massachusetts Comm'n Against Discrimination*, 402 Mass. 716, 720 (1988) (public accommodations law serves a "broad, remedial purpose" and should be given a "broad, inclusive interpretation") (quoting *Local Finance Co.* v. *Massachusetts Comm'n Against Discrimination*, 355 Mass. 10, 14 (1968)).

The Supreme Judicial Court and the trial court fully considered and rejected the Petitioner's first amendment claims:

> [T]here was no error in [the trial court's] finding that the parade was not used by the council for expressive purposes, and that, as a result, the defendants could not cloak their discriminatory acts in the mantle of the First Amendment.

C15. As the Supreme Judicial Court recognized, because there is no presumption of expressive activity, invoking the first amendment begins the court's inquiry — it does not end it. *Clark, supra.* The Supreme Judicial Court properly determined that there is no expressive purpose in this Parade.

The decision of the Supreme Judicial Court is correct as it comports with the binding precedent of this Court. In *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), this Court first considered whether a state public accommodations law infringed upon the first amendment free association rights of members of a private club. In that case, this Court determined that the operation of the public accommodations law abridged no more speech and association than was necessary to accomplish the important purposes of the non-discrimination statute. 468 U.S at 629. The decision of the Supreme Judicial Court in this case, in contrast, presents in many ways an easier question. First, the public accommodation at issue is, in the words of the trial court, an "open recreational event," and not a private club. B27. Second, both the trial court and the Supreme Judicial Court found that there was no basis for the Petitioner's assertion that the Parade constitutes their speech or expressive association. (B23-B25; C13-C15). In this case, there could be no infringement, however slight, of the Petitioner's first amendment rights because this Parade never fell within the reach of the first amendment. This case presents no important question of federal law which has not been settled by this Court.

## II. The Petition Impermissibly Seeks to Have This Court Sit as a Court of Error Over the Massachusetts Supreme Judicial Court

As the preceding discussion has shown, the Petitioners have presented no basis for the exercise of this Court's extraordinary jurisdiction under Rule 10.1 of the Rules of the Surpeme Court. Petitioners' sole purpose in seeking a writ of certiorari is to have this Court sit as a court of error and reverse the decision of the Massachusetts Supreme Judicial Court. This is not the purpose of a writ of certiorari. The facts fully support the Supreme Judicial Court's decision.

### 1. *The Decision of the Massachusetts Supreme Judicial Court is Fully Supported by Substantial Evidence.*

The Supreme Judicial Court closely scrutinized the facts found by the trial court; see e.g., C5-C7 & n.9, and determined that the findings of the trial court were supported by the evidence. Generally this Court will not disturb factual findings and conclusions of law based on subtantial evidence. *Grayson* v. *Harris*, 267 U.S. 352, 358 (1925); *Portland Ry. Co.* v. *Railroad Comm'n*, 229 U.S. 397, 412 (1913). The Supreme Judicial Court recognized the fact-intensive nature of this case when it stated the following:

> [W]e uphold the findings and rulings of the judge based on the record before us, particularly the history and nature of the parade here at issue. We do not suggest that every parade is nonexpressive or that every parade is necessarily a place of public accommodation. Rather, we base our conclusions on the unique nature of the facts found as to the parade in controversy.

(C13-C14 n.18). Under these circumstances, this Court should decline to disturb Supreme Judicial Court's findings of fact and conclusions of law in this case.

## Conclusion

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 26 1995
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No. 94-749

In The

# Supreme Court of the United States

October Term, 1994

JOHN J. HURLEY, Individually and the SOUTH BOSTON ALLIED VETERANS COUNCIL,

*Petitioners,*

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, An Unincorporated Association, By and Through TIMOTHY DALEY, BARBRA KAY, and CATHLEEN FINN, Acting on Their Own Behalf and on Behalf of the Association,

*Respondent.*

## RESPONDENT'S SUGGESTION OF MOOTNESS

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No. 94-749

In The

# Supreme Court of the United States

October Term, 1994

JOHN J. HURLEY, Individually and the SOUTH BOSTON ALLIED VETERANS COUNCIL,

*Petitioners,*

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, An Unincorporated Association, By and Through TIMOTHY DALEY, BARBRA KAY, and CATHLEEN FINN, Acting on Their Own Behalf and on Behalf of the Association,

*Respondent.*

## RESPONDENT'S SUGGESTION OF MOOTNESS

In keeping with counsel's continuing duty to keep the Court apprised, without delay, of any developments which may affect the outcome of the case, *Board of License Commissioners of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam), Respondent respectfully calls the attention of the Court to the following matters, which render the present controversy moot:

> 1. Subsequent to the adverse ruling by the state courts in the present case, Petitioners "enacted Rules and Regulations regarding the theme, the conditions of participation in future parades, and have prepared a document which will be distributed to all future participants,

advising them that they must conform to [Petitioners'] Parade Rules and Regulations." *South Boston Allied War Veterans Council, et al. v. City of Boston, et al.*, C.A. No. 94-11402MLW (D. Mass.) [hereafter "Federal District Court Case"], Petitioners' Verified Complaint, Paragraph 58.

2. On January 17, 1995, the United States District Court for the District of Massachusetts issued a declaratory judgment, based in part on changes made by Petitioners after the adverse rulings in state court, holding "that conditioning the issuance of a permit for [Petitioners'] 1995 St. Patrick Parade on the inclusion of [Respondent] violates [Petitioners'] right of expressive association under the First Amendment of the United States Constitution." Federal District Court Case at 69.

## I. INTRODUCTION

In this Memorandum, Respondent will suggest that Petitioners' undertaking to structure future Evacuation Day/St. Patrick's Day Parades in a way materially different from the Parade that gave rise to the judgment of the Supreme Judicial Court, now pending on certiorari in this Court, renders the controversy moot. Respondent's reasoning is as follows: (a) the state courts below made it quite clear that their holding, that application of the state anti-discrimination statute to the Parade did not offend the First Amendment, was predicated upon very specific facts relating to how Petitioners conducted past Parades; (b) Petitioners have made what they contend are material changes in the Parade subsequent to the state court rulings, and have indeed, based on at least some of these

changes, obtained a federal court order excluding Respondent from this year's Parade; (c) as a consequence, the judgment of the Supreme Judicial Court no longer speaks to the current realities of the controversy, and the parties have no real and personal stake in attacking or defending it. A victory for Respondent in this Court would not provide it with the relief granted in the courts below. As for Petitioners, they claim to have changed the rules of the Parade, and thus the facts that were responsible for their defeat, so that a favorable opinion in this Court, while undoubtedly comforting, would be purely advisory. Under these circumstances, this case is moot. *See, e.g., Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478 (1990).

## II. FACTUAL AND PROCEDURAL BACKGROUND.

The questions presented to this Court by Petitioners are (1) whether "the Supreme Judicial Court of the Commonwealth of Massachusetts violated the First and Fourteenth Amendment rights of the Petitioners when it compelled the Petitioners to include, in their privately organized Parade, a message the Petitioners deemed unwanted and antithetical" and (2) whether "Petitioners' refusal to include a gay, lesbian, and bisexual message within a private parade can be declared unlawful discrimination by the government without violating the Petitioners' First and Fourteenth Amendment rights." Petition for Certiorari at i and Appendix B at B28.

After a four-day trial, the Massachusetts Superior Court found the following pertinent facts, among others: (1) Petitioners exercised no genuine selectivity in

choosing Parade participants and sponsors; (2) Petitioners had no written procedures for selecting Parade participants or sponsors; (3) Petitioners did not generally inquire into the specific messages or views of each applicant; (4) applications from new groups were voted on in "batches"; (5) some groups participated in the 1993 Parade by simply showing up at the Parade without submitting any application; (6) other groups gained entrance by contribution rather than by the application process; (7) admission procedures were not uniformly applied; and (8) the Petitioners "always opted for heterogeneousness" and diversity rather than focusing on a specific message, theme or group. Petition for Certiorari, Appendix B at B6-B8, B24-B25.

Based on these factual findings, the Superior Court held that Petitioners' event was a public, open, recreational event rather than a private parade and thus was a "public accommodation" within the purview of Mass. G.L. c. 272, § 92A. (*Id.* at B9 and B27). In addition, the Superior Court held that it was "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment." (*Id.* at B25). However, the Superior Court was careful to note that "[t]his is not to say, . . . . that the Parade can never become a protected First Amendment activity. It simply has not been one in the past and is not one now." (*Id.* at B25 n.27).

The Massachusetts Supreme Judicial Court affirmed the trial court's factual findings and ruling as to the violation of the state "public accommodations" statute as well as its rejection of the Petitioners' First Amendment claims. At the same time, the Supreme Judicial Court was

careful to note that "[w]e do not suggest that every parade is nonexpressive or that every parade is necessarily a place of public accommodation. Rather, we base our conclusion on the unique nature of the facts found as to the parade in controversy." *Irish-American Gay, Lesbian and Bisexual Group of Boston* ["GLIB"] *v. City of Boston*, 418 Mass. 238, 250 n.18, 636 N.E.2d 1293 (1994); Petition for Certiorari, Appendix C at C13-C14.

After the Supreme Judicial Court issued its Order on March 11, 1994, Petitioners canceled the March 20, 1994 Parade and took significant steps to alter "the unique nature of the facts found as to the parade in controversy" in the state court proceedings.

On April 19, 1994, Petitioners adopted written Standards and Regulations for the governance of the Parade. *See* Federal District Court Case, Affidavit of John J. Hurley, July 11, 1994.[1]

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[1] The new Standards and Regulations announce that Petitioners will henceforth:

(1) identify the Petitioners' themes or messages, i.e., to honor St. Patrick; to celebrate the Petitioners' version of the role of traditional families throughout Irish history; and to commemorate the Petitioners' rejection of "judicially imposed messages on the parade of Sunday, March 20, 1994." (Standards & Regulations, ¶ 1(a) and Conclusion);

(2) establish formal, written procedures for selecting participants or sponsors, including a requirement that a letter of acceptance from the Parade Committee is necessary to participation as is a signed Parade Participation Agreement form. (*Id.*, ¶¶ 2(a)-2(g));

On April 20, 1994, the Petitioners applied for a permit to conduct the 1995 parade in accordance with their newly-promulgated Standards and Regulations. Petitioners indicated that the Parade would be "by invitation only" and set forth a three-fold theme first articulated in the April 19, 1994 Standards and Regulations: (1) to honor St. Patrick; (2) to celebrate the role of traditional families in Irish history; (3) and to commemorate the rejection of judicially-imposed messages on the 1994 parade. Letter from John J. Hurley to Francis Tramontozzi, April 20, 1994. By letter dated May 2, 1994, the City of Boston declined to act on the Petitioners' request, stating that it was premature. Letter from Francis Tramontozzi to John J. Hurley, May 2, 1994.

On July 12, 1994, the Petitioners commenced an action in the United States District Court for the District of Massachusetts. Petitioners represented in their federal court complaint that they had altered the nature of the

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(3) control any form of expression or message by sign, banner, symbol, word or deed deemed unsuitable by the Parade Committee by determining that only "banners, themes, messages, or displays approved by the Committee are allowed in the parade." (*Id.*, ¶¶ 4(a), 4(j), 4(k)); and

(4) obtain from potential participants, through a signed Parade Participation Agreement, a statement of, among other things: (a) the nature and content of the participant's signs or banners to be carried or displayed and any materials to be distributed; and (b) the participant's affirmation of the honesty and completeness of its representations, particularly anything "which might impact or adversely affect or alter in any way the expression intended as the theme of this Parade as articulated in the Standards and Regulations, Section I." (Parade Participation Agreement, pp. 2-3).

1995 Parade by adding a theme protesting the Supreme Judicial Court's decision against them and by adopting written Standards and Regulations that they indicated would be permanent.[2]

On January 17, 1995, the United States District Court (Wolf, J.) issued a Memorandum and Order declaring that "conditioning the issuance of a permit for the Veterans' 1995 St. Patrick Day Parade on the inclusion of GLIB violates the Veterans' rights of expressive association under the First Amendment of the United States Constitution." Federal District Court Case, Memorandum and Order, Jan. 17, 1995, slip op. at 69).[3]

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[2] In their verified complaint in the Federal District Court Case, Petitioners expressly allege that "in consideration of footnote [27 in the Massachusetts Superior Court decision which noted that '[t]his is not to say, however, that the Parade can never become a protected First Amendment activity'] the Veterans have defined in writing the theme of the March 19, 1995 St. Patrick's Day parade, and have enacted Rules and Regulations regarding the theme, the conditions of participation in future parades, and have prepared a document which will be distributed to all future participants, advising them that they must conform to the Veterans' Parade Rules and Regulations." (Complaint, ¶ 58).

[3] Judge Wolf relied on the inclusion of the protest theme as the grounds for his decision rather than the change in the rules. He was of the view that principles of collateral estoppel prevented him from deciding whether the new rules altered the Parade sufficiently to nullify the holdings of the state courts. Federal District Court Case, slip op. at 43.

## III. DISCUSSION.

A case is moot if the passage of time and intervening events have cost it "its character as a present, live controversy of the kind that must exist if [this Court is] to avoid advisory opinions on abstract questions of law." *Princeton University v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) *quoting from Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam). In the present case, this Court has been asked to review a prospective injunctive order that was based on a Parade that was conducted under rules and with themes that, by Petitioners' representations, no longer obtain. On the basis of their representations, Petitioners have succeeded in excluding Respondent from the 1995 Parade. Thus, in the absence of a claim for money damages, it appears that nothing remains of the controversy that the Supreme Judicial Court sought to resolve in the judgment now pending on review in this Court.

For the purposes of this Court's Article III mootness assessment, the pertinent question is whether the parties have a genuine personal stake in this Court's determination of the legal issues they have brought before the Court. *See Lewis v. Continental Bank Corp.*, 494 U.S. at 478, 479 ("parties must continue to have a 'personal stake' in the outcome of the lawsuit"; " . . . the Article III question is not whether the requested relief would be nugatory as to the world at large, but whether [the prevailing party] has a stake in that relief"). Respondent suggests that the controversy addressed by the courts below is no longer a live one. The parties may indeed be at odds in the future over whether Respondent can participate in future Parades. However, Petitioners' actions have made that a different controversy, based on facts that Petitioners

claim are materially different, and raising different legal issues.

It is irrelevant for mootness purposes whether Petitioners' actions will, or will not, ultimately lead to a different legal result in the Massachusetts courts as to any violation of the state public accommodations laws or, for that matter, as to any violation of Petitioners' First Amendment rights. What does matter is that Petitioners have presented a new factual situation that requires a fresh legal determination of the rights of the parties. As events have developed, the only act which the decision below could affect was the exclusion of Respondent from the 1994 Parade, the date of which is irretrievably gone. As demonstrated by the Federal District Court Case, Respondent's rights with respect to future Parades will be decided on the basis of different facts, possibly resulting in different legal consequences. Therefore, the injunction granted below has become moot. *See* Stern, et al., Supreme Court Practice at 712 & n.16 (7th ed. 1993) (citing cases).

Where factual circumstances have changed, this Court has not hesitated to hold a controversy moot. For example, in *Princeton University v. Schmid*, 455 U.S. 100, a non-student was arrested for distributing political materials on campus without the permission required under University rules. The University, joined as a party to state court proceedings, urged its federal constitutional rights. However, while review was pending, the University "substantially amended its regulations governing solicitation, distribution of literature, and similar activities on University property by those not affiliated with the University." *Id.* at 103. Finding that the "issue of the validity

of the old regulation [was] moot" and that the validity of the revised regulation was not addressed below, this Court dismissed the appeal. *Id.* at 103; *cf. Gilligan v. Morgan*, 413 U.S. 1 (1973) (claim for injunctive relief against the National Guard arising out of events at Kent State; there had been a number of changes in the factual situation, including new "use of force" rules by the National Guard and revised training procedures; three members of the Court's five-member majority saw some basis for a conclusion of mootness; the four dissenters were convinced of mootness; and two concurring Justices found all but a small portion of the claim to be moot).

Moreover, none of the exceptions developed in this Court's mootness jurisprudence are applicable to this matter. The present case does not present a matter capable of repetition yet evading review. The case would presumably not be moot if the factual circumstances on which the lower courts predicated their ruling remained unchanged, despite the fact that Parades have come and gone. However, when the facts change and the legal issues change with them, it cannot be said that "the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam). That is the case here.

Further, Petitioners cannot complain about a dismissal for mootness because it is Petitioners' own actions that have brought about this result. Indeed, Petitioners took very specific actions with the intention of taking themselves outside the purview of the decisions below. Having reaped the benefits of their actions in the federal

district court litigation, they must also bear the consequences of having divested this Court of jurisdiction.

Nor is this is a factual situation invoking the "voluntary-cessation" doctrine of *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953) and its progeny. That doctrine applies where the defendant below puts an end to a challenged practice and claims that its action has mooted the controversy. Here, Petitioners have not ceased their challenged practice, i.e., the exclusion of Respondent from the Parade. Rather, Petitioners have worked – successfully to date – to alter the legal framework in which their ongoing intent to exclude GLIB will be considered by the courts.[4]

In sum, this case is moot both as a matter of the requirements of Article III as well as for prudential reasons. While prudential grounds might support stretching the bounds of mootness in some cases, this is not such a case. *See generally* Tribe, *American Constitutional Law* § 3.11, p. 93 (2d ed. 1988). On the contrary, the tension between the state anti-discrimination statute and the First Amendment should not be decided on the basis of ephemeral facts that have already changed enough to have persuaded the federal district court to grant Petitioners the relief they have sought. In this context, it

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[4] Even if the "voluntary-cessation" doctrine were somehow to apply in this case, there is no reasonable expectation that the Petitioners will return to the manner of running their parade as they did in 1993 (and intended to in 1994) where the courts below have warned them away from such a course. In such circumstances, this Court has found cases to be moot. *See, e.g., County of Los Angeles v. Davis*, 440 U.S. 625, 631-633 (1979); *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974); *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972).

should be remembered that the state courts have made clear their view that the reach of the "public accommodation" provision of the state anti-discrimination law depends on the specific facts of the case, as does the applicability of Petitioners' First Amendment defense. ("We do not suggest that every parade is nonexpressive or that every parade is necessarily a place of public accommodation. Rather, we base our conclusion on the unique nature of the facts found as to the parade in controversy." *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, 418 Mass. at 250 n.18.) Under the new facts created by Petitioners' actions, the state court may ultimately hold that post-1994 Parades are not "public accommodations" as a matter of state law, thereby avoiding the constitutional question. *Cf. Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

For all of the foregoing reasons, Respondent submits that the case is moot.[5]

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[5] Respondent submits that the proper action in this case is a dismissal without vacating the lower court's decision. As the Court recently made clear in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, ___ U.S. ___, 115 S. Ct. 386 (1994), mootness by "happenstance" provides reason to vacate the judgment below while mootness by voluntary action of the losing party does not entitle the losing party to vacatur. *Id.* at 391-392 and n.2. "The denial of vacatur is merely one application of the principle that '[a] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks'." *Id.* at 392, *quoting from Sanders v. United States*, 373 U.S. 1, 17 (1963).

In the present case, mootness is the result of the voluntary actions of the petitioners; and, therefore, the petitioners are not entitled to vacatur of the judgment below.

In addition, in cases from state courts, vacatur has not been the Court's invariable practice. *Doremus v. Bd. of Education of the*

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DATED: January 26, 1995

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*Borough of Hawthorne*, 342 U.S. 429, 434 (1952) (while the Supreme Court may not do so, state courts may render an opinion on a federal constitutional question even if it could be regarded as only advisory); *Bd. of License Commissioners of Tiverton v. Pastore*, 469 U.S. 238 (writ dismissed as moot); *Aikens v. State of California*, 406 U.S. 813 (1972) (per curiam) (writ dismissed as moot); *see Princeton University v. Schmid*, 455 U.S. 100 (appeal dismissed as moot).

(4)

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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No. 94-749

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JOHN J. HURLEY, INDIVIDUALLY AND THE SOUTH BOSTON ALLIED VETERANS COUNCIL,

*Petitioners,*

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, AN UNINCORPORATED ASSOCIATION, BY AND THROUGH TIMOTHY DALEY, BARBRA KAY, AND CATHLEEN FINN, ACTING ON THEIR OWN BEHALF AND ON BEHALF OF THE ASSOCIATION

*Respondents.*

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**On Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts**

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## PETITIONER'S RESPONSE TO RESPONDENTS' SUGGESTION OF MOOTNESS

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*Respondents.*

---

**On Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts**

---

## PETITIONER'S RESPONSE TO RESPONDENTS' SUGGESTION OF MOOTNESS

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This appeal is not moot. The appeal concerns a decision of the Supreme Judicial Court of Massachusetts ("SJC") which violates the first amendment rights of petitioners John J. Hurley and the South Boston Allied War Veterans Council ("the Veterans"), based on that Court's interpretation and application of the Massachusetts Public Accommodations Statute, M.G.L. c. 272 §§ 92A & 98, and the United States Constitution. *First*, as a result of the Massachusetts decision, the Veterans currently live under a permanent injunction which acts as a prior restraint on their

free expression, in stark violation of the first and fourteenth amendments to the United States Constitution. *Second*, the Veterans have been subjected to substantial fines because of activity protected by the first and fourteenth amendments.[1] *Finally*, the Veterans are potentially subject to criminal penalties arising out of the Massachusetts Court's decision—all because they wish to exercise fundamental first amendment rights.

None of this has been altered or affected in any way by the recent decision of the U.S. District Court for the District of Massachusetts, which forms the sole basis for respondents' Suggestion of Mootness. This case remains a live controversy in which the Veterans have an obvious and critical stake. The appeal is therefore far from moot. This Court's consideration of this live controversy is the only hope of ending an ongoing violation of the Veteran's constitutional rights.

## BACKGROUND

Respondents' Suggestion of Mootness is founded entirely on their interpretation of a declaratory judgment issued on January 17, 1995 by the United States District Court for the District of Massachusetts, *Allied War Veterans Council, et al. v. City of Boston, et al.*, No. 94-11402MLW (D. Mass. 1995), and its effect on the Massachusetts Supreme Judicial Court decision that is the subject of this appeal. The recent federal district court case deals exclusively and narrowly with *this year's* St. Patrick's Day Parade, which includes a protest theme in response to the censorship of the free expression of the petitioners by the Commonwealth of Massachusetts. In contrast, the decision of the Massachusetts Supreme Judicial Court, which is the subject of this appeal, concerns the traditional St. Patrick's Day Parade held by the Veterans. The usual parade is not a protest, but a celebration honoring St.

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[1] In addition, the Veterans have been ordered to pay $42,046.98 in attorneys fees to the respondents in this case, and another motion for an additional $43,711.96 is still pending against them.

Patrick and expressing support for traditional religious and cultural values.

The parade as traditionally constituted by the petitioners is enjoined from proceeding as it has in the past. As such it was held to be violative of a Massachusetts Public Accommodations Law. The judgment and order enjoining the Veteran's expression, and imposing financial penalties, remains in effect today. Perhaps more egregiously, the Massachusetts Court's decision attempts to expressly dictate the expressive content of the parade. In other words, the Veterans are no longer allowed to express what they have expressed annually for forty-seven years. If left unchallenged, the decision of the Supreme Judicial Court will remain the law in Massachusetts, the Veterans will be forced to pay substantial fines penalizing the content of their speech, and they will live under a prior restraint preventing them from ever again expressing themselves as they have for nearly half a century.

Petitioners' Suggestion of Mootness misstates many facts and mischaracterizes both the recent decision by the U.S. District Court in Massachusetts and the Massachusetts Supreme Judicial Court. A reading of both decisions immediately reveals the meritless nature of petitioners' eleventh-hour mootness suggestion. The federal district court in Massachusetts stated repeatedly, clearly, and explicitly that the Court considered a *limited* controversy, and that its consideration of that limited controversy has no bearing on the ongoing dispute over the decision of the Massachusetts Supreme Judicial Court.

The United States District Court for the District of Massachusetts addressed the issues of free expression and association surrounding the "materially different" Saint Patrick's Day Parade scheduled by the Veterans for 1995. District Court Op. at 3. The District Court correctly recognized this protest component of the 1995 parade as a "new controlling fact," District Court Op. at 4, and it made clear that its decision should not be regarded as a comment on the

correctness of the prior decisions of the courts of the Commonwealth that are at issue before this Court. The federal district court went to great lengths to emphasize that it was deciding a very narrow issue regarding only the 1995 Veterans' parade. The district court stated unequivocally that it was not addressing or deciding any issue presently before this Court relating to the decision of the Massachusetts Supreme Judicial Court: "Nor should this decision be regarded as a comment on the correctness of the prior decisions of the courts of the Commonwealth concerning the unfortunately *enduring* dispute between the Veterans and GLIB. Only the Supreme Court can review the Supreme Judicial Court's decision regarding the 1993 Parade; it has agreed to do so. This Court has addressed a materially different matter." District Court Op. at 7 (emphasis added).

## ARGUMENT

A case is moot only if the issues presented are no longer live or if the parties lack a legally cognizable interest or "personal stake" in the case. *United States Parole Commission v. Geraghty*, 445 U.S. 388, 395 (1980). Neither is true here. In this case, the Veterans assert that the Massachusetts Supreme Judicial Court's permanent injunction violates their fundamental constitutional rights. The Massachusetts Court issued a permanent injunction against the traditional parade, and levied fines and other financial penalties. If the Veterans win in this Court they will be freed from the injunction and the fines. They again will be able to conduct the parade exactly as they did before the Massachusetts Court entered its injunction.[2] They will no

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[2] Any suggestion that the Veterans have "permanently" altered the regulations governing the parade, Resp. Br. at 7 n.2, or that "there is no reasonable expectation that the petitioners will return to the manner of running their parade as they did in 1993 (and intended to in 1994) where the courts have warned them away from such a course," Resp. Br. at 11 n.4, is false. The Veterans emphatically wish to return to the way they have run

(continued...)

longer be subjected to the onerous penalties on speech imposed by the court below. There simply can be no more serious or "legally cognizable" interest, nor a more personal stake, than the vindication of the fundamental rights of free expression and free association guaranteed by the United States Constitution.

In this case, the Commonwealth of Massachusetts is not only permanently banning the Veterans' speech in the future based solely on its content, but also exacting financial (and possibly criminal) penalties based solely on the content of the Veterans' past speech. It cannot be seriously asserted, then, that this case is moot. This case presents the Court with an ongoing and egregious violation of the constitutional rights *of the Veterans*. The harm from such a violation is irreparable. The controversy is live. The stakes are high. Any suggestion of mootness is specious.

The ongoing effect of the decision of the Supreme Judicial Court is most directly illustrated by the very fact that the Veterans have been forced by the Massachusetts Court to drastically alter the content of this year's parade. As stated, this year's parade is not the usual celebration, but also features a protest theme against the state-imposed bar on the traditional parade. The non sequitur that provides the sole basis for the respondents' mootness suggestion is that because a federal court has held that the Constitution protects the 1995 protest parade, this Court is now prevented from considering the merits of the main controversy arising from the deprivation of constitutional rights which is itself the subject of the protest theme of this year's parade. To state this position is to refute it.

The Veterans have temporarily altered their conduct to protest recent decisions by the Commonwealth courts. The addition of a protest component to the traditional celebration of

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[2] (...continued)
the parade for the last 47 years. That is precisely why the Veterans petitioned this Court to review this case.

St. Patrick, the traditional family, and the values it exemplifies is an emergency response to recent judicial mandates forcing the association of two radically disparate groups representing two radically different messages. This protest is a temporary divergence from the goals that have traditionally motivated the parade organizers, namely the honoring of St. Patrick and the celebration of the important role traditional families and values play in society. This change is a direct response to adverse decisions by the Massachusetts courts which have outlawed the expressive content of the Veterans' traditional parade.

Under GLIB's reasoning, any time a court issues a prior restraint on speech, and the speaker abides by the injunction not to speak, then the very act of remaining silent renders the case moot. So, according to GLIB, because there is no more speech, there can be no more dispute over a permanent order preventing such speech, even though the existence of the injunction is the sole reason for the silence. Therefore, if a litigant chooses to abide by an injunction while his appeal is pending, GLIB argues such compliance itself renders an appeal moot. In other words, only lawbreakers can appeal. Such tortured reasoning falls under its own weight. It would leave litigants with the Hobson's choice of either defying a court order and risking civil and criminal contempt sanctions, or abiding by the order and, by that very act, forfeiting their appeal.

Further, as this Court has often observed, even "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W.T.Grant Co.*, 345 U.S. 629, 632 (1953). "Nor can it be argued that the case has become moot because respondents have abandoned their efforts as a result of the very harassment they sought to restrain by this suit." *A.Y.Allee v. Medrano*, 416 U.S. 802, 810 (1974). This state-forced change in the Veterans' speech does not support mootness, but rather powerfully establishes the

continuing force of the underlying order and the necessity for this appeal.[3]

The continuing effect of the Massachusetts decision on the Veterans is also illustrated by the fact that the city of Boston would not issue the Veterans a parade permit this year unless the Veterans certified that they would comply with the Superior Court's permanent injunction and not exclude GLIB from the 1995 parade. District Court Op. at 16. As in *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968), the Massachusetts Supreme Judicial Court's decision "continues to play a substantial role in the response of officials to their activities," *id.* at 350, and as the Court held in that case, "[i]n these circumstances, [the Court's] jurisdiction is not at an end." *Id.* As the federal district court stated, "[o]nly the Supreme Court can review the Supreme Judicial Court's decision regarding the 1993 parade," as it addressed "a materially different matter" than that which was before the district court. District Court Op. at 7..

The decision of the SJC continues to play a substantial role in the response of state officials to the actions of the Veterans in organizing the parade, making the decision the core of an ongoing controversy. The SJC's decision, if left to stand, will forever prevent the Veterans from returning their parade to its traditional purpose, namely, the celebration of the traditional family and the values it exemplifies. The Veterans

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[3] The cases cited by the respondent on the "voluntary cessation" doctrine are completely inapposite. In those cases, the defendant voluntarily ceases an offending activity because of pending litigation and an impending court order, and then asks the court to find the controversy moot so as to avoid the court order. The voluntary cessation doctrine prevents defendants from mooting cases on the eve of judgment and repeating the offending behavior: the case is not moot unless "there is no reasonable expectation that the wrong will be repeated." *United States v. W.T. Grant Co.*, 345 U.S. at 633. In this case, on the other hand, the defendants (petitioners) have ceased the prohibited activity only because of an *actual* court order, and it is the *plaintiffs* (respondents) who wish to declare the controversy moot.

have followed the course directed by this Court in *Walker v. City of Birmingham*, 388 U.S. 307 (1967). They have sought judicial review of an injunction and refrained from disobeying it, no matter how well-founded their doubts have been as to its validity. In identical circumstances, when such a course has been pursued by petitioners in view of the continuing vitality of their grievance, this Court has stated "we cannot say that their case is moot." *Carroll*, 393 U.S. at 179.

Finally, GLIB critically undermines its mootness argument and reveals its true motives in its discussion of vacatur in the final footnote to its mootness brief. There GLIB asserts that the appeal of the Massachusetts decision should be dismissed as moot, but that the state decision and the prior restraint and penalties it imposes should not be vacated. By this statement, GLIB reveals its clear understanding that the decision of the Massachusetts Court continues to have force over the parties to this appeal and to directly affect their rights. Why else would GLIB insist that the decision be left undisturbed?

## CONCLUSION

For the foregoing reasons, this Court should now resolve "the unfortunately enduring dispute between the Veterans and GLIB." District Court Op. at 7. This is a case involving a prior restraint on speech. It is a case involving fines and fees levied to punish speech based solely on its content. To be moot a decision must have no effect on the parties. This case has a direct, ongoing, and irreparable effect on the Veterans. This case is not moot. It is urgent. This

Court certainly retains the power to resolve this live controversy.

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No. 94-749

In The

# Supreme Court of the United States

October Term, 1994

JOHN J. HURLEY, Individually and the SOUTH BOSTON ALLIED VETERANS COUNCIL,

*Petitioners,*

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, An Unincorporated Association, By and Through TIMOTHY DALEY, BARBRA KAY, and CATHLEEN FINN, Acting on Their Own Behalf and on Behalf of the Association,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts**

## RESPONDENT'S REPLY CONCERNING MOOTNESS

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No. 94-749

In The

# Supreme Court of the United States

October Term, 1994

JOHN J. HURLEY, Individually and the SOUTH BOSTON ALLIED VETERANS COUNCIL,

*Petitioners,*

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, An Unincorporated Association, By and Through TIMOTHY DALEY, BARBRA KAY, and CATHLEEN FINN, Acting on Their Own Behalf and on Behalf of the Association,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts**

## RESPONDENT'S REPLY CONCERNING MOOTNESS

Paying scant attention to the actual facts as they have developed, Petitioners resist Respondent's Suggestion of Mootness. Stripped of rhetoric, Petitioners' objections to mootness amount to these: (1) the existence of a "permanent" injunction creates a burden on the exercise of Petitioners' yet-to-be-established First Amendment rights, which burden will be lifted if Petitioners prevail on the

merits in this Court; (2) Petitioners have been subjected to fines that victory in this Court will annul; and (3) Petitioners might be criminally prosecuted for their past acts of discrimination unless this Court finds their past conduct protected. Petitioners' Response to Respondents' Suggestion of Mootness ["Response"] at 1-2. None of these "reasons" withstand scrutiny.

**(1) The Existence of a "Permanent" Injunction.**

Petitioners now assert that the state court injunction is an ongoing burden on their conduct of future parades. This argument is a flat contradiction of Petitioners' earlier recognition of the transitory nature of the injunction, whose ongoing viability was specifically linked by the Massachusetts courts to the possibility of changes in the nature of the parade:

> Although the Plaintiffs [Respondent in this Court] have obtained a permanent injunction, the injunction is conditional. The Plaintiffs are judicially empowered to march in the Veterans' Parade, and the Veterans are required to accept the Plaintiffs in their Parades on the same terms and conditions as other participants, *as long as the Veterans' Parades are not First Amendment activities*. The judgment is the equivalent of an unresolved chord, in that within the court's decision, it was stated that the Veterans' Parade could become a "protected First Amendment activity" (F. p. 31 n.27)

Defendants' [Petitioners'] Opposition to Plaintiffs' [Respondent's] Motion to an Award of Attorneys' Fees and Costs Against the South Boston Allied War Veterans Council and John J. Hurley ["Opposition to Attorneys'

Fees"], *GLIB v. John J. Hurley, et al.*, C.A. No. 92-1518, 92-1518A. (September 27, 1994.) (Emphasis in original.)

Recognizing the Massachusetts court's sensitivity to First Amendment concerns, Petitioners, by promulgating written standards, have endeavored to take advantage of that sensitivity in order to obviate the force of that court's injunction. They were entitled to do this, although they were certainly not obligated to do so. But having made this choice, Petitioners cannot also be heard to say that they have not changed the facts in a legally significant way, thereby rendering the controversy that brought them to this Court moot.

Taking the state court's express statement that its determinations were fact-specific to the Parade as it found it to have been constituted in 1993 together with the changes in Parade rules made by Petitioners to insure First Amendment protection for future Parades, it is clear that the state court injunction no longer speaks to future parades. Indeed, Petitioners have insisted that this is so in the above quoted language and in their pleadings in federal court. The factual predicates of the state court's action having been changed, nothing this Court might say about things as they were in 1993 will affect the conduct of any future Parade.

Petitioners argue that the controversy is not moot because their actions in thus altering their conduct were an "emergency response" to the unwanted "judicial mandates." Response at 5-6. In the first place, Petitioners were under no compulsion to change the nature of their parade, and even if they felt strong incentive to do so, this does not necessarily avoid mootness. *See Application*

*of Kingsley*, 802 F.2d 571, 577 (1st Cir. 1986) (appellant seeks order in forfeiture action to allow occupancy in residence pending outcome of action; his agreement with government allowing him to occupy residence subject to conditions mooted his claim, despite element of duress forcing appellant into agreement).

The present case does not bear comparison to *Allee v. Medrano*, 416 U.S. 802 (1974), cited by Petitioners, where Texas law enforcement agencies used force and intimidation against union members and officials to discourage organizing activities, and then in this Court urged mootness when the union members abandoned their organizing efforts in the face of this vicious and illegal harassment. *Id.* at 806-809. Nothing in this case remotely resembles the actions of the law enforcement agents in *Medrano*.

Moreover, Petitioners have decidedly not abandoned their activities, and indeed will march in 1995 without the participation of Respondents. Had this Court not granted certiorari in this case, and had the federal court not intervened in the 1995 Parade on the basis of the "protest theme," Petitioners would undoubtedly certainly have been before the state court arguing that new facts rendered the injunction moot, so that they could conduct future parades without Respondent.

Petitioners' argument misses the point in another way as well. The 1994 Parade has come and gone, and the same will be true of the 1995 Parade before this Court decides the merits of this case. Thus nothing that this Court does will affect the 1994 or 1995 Parades, nor can

this Court's decision affect any putative First Amendment chill that Petitioners allegedly have experienced up to the present time. Rather, as Respondent has previously explained,[1] the issue is whether the effect on future Parades of the injunctive remedy ordered by the Massachusetts courts is sufficient to present a live case or controversy in which Petitioners have a personal stake. *United States Parole Commission v. Geraghty*, 445 U.S. 388, 395 (1980). As Petitioners themselves have acknowledged, the injunction will have prospective effect only "as long as the Veterans' Parades are not First Amendment activities." Seeking to ensure that future Parades unquestionably *are* First Amendment activities, Petitioners have adopted rules that establish in writing Petitioner's asserted right to insist that "only banners, themes, messages, or displays approved by the Committee are allowed in the parade." *See* Respondent's Suggestion of Mootness at 7 n.2 (citing Petitioners' new Standards and Regulations at Paragraph 4). Wholly apart from the "protest theme," which Petitioners may or may not choose to retain in the future, the "new rules" clearly seek to take the state court trial judge at his word and establish beyond dispute that future Parades will be beyond the reach of the state anti-discrimination statute and the state court injunction. Under these circumstances, it is untenable, as well as irrelevant, to claim that the present controversy is exempt from mootness because the injunction constitutes a "state-forced change in [Petitioners'] speech," Response at 6, based on the fact that Petitioners have taken steps meant to unequivocally

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[1] Respondent's Suggestion of Mootness at 9.

assert their First Amendment rights as to future Parades. The rules Petitioners promulgated did not constitute conformity with the state court injunction or cessation of action in response to that injunction, but an effort to moot it and continue in their chosen course. It is equally insupportable for Petitioners to claim that their purported assertion of First Amendment rights is "temporary," as if they are planning to relinquish the protection of the First Amendment at some future time. *See* Response at 4 n.2.

Nor is it the case, as Petitioners assert, citing *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), that the state court injunction continues to play a role in official response to Petitioners' activities. In *Carroll*, members of a white supremacist group alleged that the continuing effect of a ten day restraining order, affirmed by the Maryland Court of Appeals, had a lasting effect on their ability to hold rallies in Princess Anne, Maryland. The order by its terms only prevented one rally, but the petitioners alleged that the affirmance of the order by the Maryland Court of Appeals resulted in the denial of at least one other permit outside the ten day period. *Id.* at 177-78. This Court agreed that the case was not moot because the Court of Appeals' decision played a substantial role in the response of officials to requests by the petitioners for other permits. *Id.* at 178.

In the present case, in contrast, there was no denial of a permit. Petitioners had a permit for 1994 which they chose not to use. As for 1995, the federal district court action has resulted in a declaration the Petitioners are entitled to a permit to conduct the Parade not subject to the state court injunction, and based on the City of Boston's representations to the federal district court, a permit

will issue and Petitioners will hold the 1995 Parade without Respondents' participation. *See South Boston Allied War Veterans Council v. City of Boston*, No. 94-11402MLW (D.Mass 1995), slip op. at 69. The issuance of permits in future years, unlike the case presented in *Carroll*, depends on a new determination by the state court, on the basis of Petitioners' "new rules," adopted by Petitioners in an effort to ensure First Amendment protection, and on the basis of their unambiguous and uncoerced intent to transform future Parades from what the state courts have found to have been "open recreational events" into First Amendment activity.[2]

*Princeton University v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam), cited by Respondent in its Suggestion of Mootness, and ignored by Petitioners in their Response, is emphatically on point. In that case, Princeton University had regulations in effect at the beginning of the lawsuit that required non-students who wished to distribute materials on campus to receive permission from University officials. *Id.* at 101. Schmid violated that rule and was convicted of criminal trespass. The New Jersey Supreme Court invited the University to intervene and participate as a party. The University did so. When the New Jersey Supreme Court reversed Schmid's conviction,

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[2] It is disingenuous, to say the least, for Petitioners to claim that mootness would penalize them for obeying a court order. Response at 6. Petitioners did not disobey the order to include Respondent in the 1994 Parade but neither did they obey it. As for 1995, they have obtained the relief they sought in federal court and will have a Parade "honoring St. Patrick" without the presence of Respondent.

Princeton appealed to this Court, alleging that the judgment below violated its First, Fifth and Fourteenth Amendment rights. *Id.* This Court dismissed the appeal, stating:

> The New Jersey Supreme Court noted that while the case was pending on appeal, the University substantially amended its regulations [relating to distribution of materials on campus by those not affiliated with the University]. The opinion below rested on the absence of a reasonable regulatory scheme governing expressional activity on University property, but the regulation at issue is no longer in force. **Furthermore, the lower court's opinion was careful not to pass on the validity of the revised regulation under either the Federal or the State Constitution**. Thus the issue of the validity of the old regulation is moot, for this case has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law."

*Id.* at 103 (citation omitted; emphasis added). In the present case, the Massachusetts courts were equally careful to tailor their holding to the prior factual regime under which Petitioners conducted the Parade. Having now announced that there are "new rules" designed to protect the "traditional themes" of the Parades, Petitioners have mooted the issue originally presented to this Court, whether the Massachusetts courts rightly decided that the First Amendment did not shield Petitioners from the reach of the public accommodation statute in conducting the parade as then constituted.

**(2) Liability for Fines and Attorneys' Fees.**

Petitioners assert that they "have been subjected to substantial fines because of activity protected by the first and fourteenth amendments." Response at 2. They neglect to mention that the penalty alluded to was imposed in an entirely separate case that is not before this Court, *Patrick Ward v. South Boston Allied War Veterans Council*, MCAD No. 92-BPA-0014. A petition to review that case, *see* Mass. Gen. Laws, c. 151B, § 6, filed in Massachusetts Superior Court, No. CV-94-00456, was dismissed for lack of service on May 25, 1994.

Under these circumstances, there is no merit to the argument that the *Patrick Ward* case, now dismissed, gives Petitioner's a live stake in the present case. If this Court were to reverse the Supreme Judicial Court's decision in this case, it would not relieve plaintiffs of any penalties imposed in that case.[3]

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[3] Moreover, the penalty at issue was levied for Petitioners' behavior in the 1992 Parade, an event which raised legal issues quite different from those in the present case. The City of Boston was a major actor in the 1992 Parade. Indeed, Respondent won the right to march in the 1992 Parade on the theory that the City of Boston, and Petitioners, "acting under color of state law, have deprived [Petitioners] of the rights to freedom of speech, association, assembly, and equal protection of the laws in violation of the first and fourteenth amendments to the U.S. Constitution, 42 U.S.C. § 1983, and Articles 1 and 16 of the Massachusetts Declaration of Rights." Verified Complaint, *Irish-American Gay, Lesbian and Bisexual Group of Boston, etc. v. City of Boston, et al.*, Civil Action No. 92-1518 ["No. 92-1518"], paragraph 35. Respondent also relied on the Massachusetts Civil Rights Act and a claim for breach of contract, both claims reaching both the City and Petitioners. Verified Complaint, paragraphs 36-40. The

As for the issue of attorneys' fees, the trial court's award of fees to Respondent in the present case is currently on appeal by Petitioners. The issue of the 1992 attorneys' fees remains undecided, but, as with the penalties, that Parade raises issues of state action not present in the current case. In any event, a claim for attorneys' fees cannot enliven an otherwise moot controversy. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (federal law) (1990); *Ott v. Boston Edison Co.*, 413 Mass. 680, 683, 602 N.E.2d 566, 588 (1992) (Massachusetts law). In addition, Respondent no longer has any wish to seek to collect attorneys' fees, either for the 1992 case or for the present case, and counsel represents to the Court that appropriate steps to permanently relinquish those claims will be taken forthwith.

**(3) Danger of Criminal Prosecution.**

The last discriminatory act on the part of Petitioners occurred in early 1993, when Respondent was denied a registration form for the 1993 Parade. No criminal prosecution has been undertaken against Petitioners, and two years later there is no evidence that any is contemplated. Under these circumstances, the threat of criminal

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Superior Court (Zobel, J.) found that Respondent was entitled to a restraining order requiring that they be permitted to march in the 1992 Parade because, in relevant part, he found that Respondent was likely to succeed on its claim that it would otherwise be deprived of its constitutional right of peaceable assembly. No. 92-1518, Proceedings, March 11, 1992, at 10. No appeal was taken from that order.

prosecution is chimerical, and will not confer jurisdiction of an otherwise moot controversy upon this Court. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 n. 29 (1974); *McCollester v. City of Keene, N.H.*, 668 F.2d 617, 619-20 (1st Cir. 1982) (to present a live controversy based on threat of criminal sanctions, there must be a "realistic danger of prosecution.")

## CONCLUSION

The "unfortunately enduring dispute" between Petitioners and Respondent may continue. Indeed, Petitioners have taken the position that it is "type of conflict that cannot be resolved in a court of law." Opposition to Attorneys' Fees at Paragraph 11. At this juncture, it is clear that Article III bars this Court's advice on a phase of the dispute that Petitioners have made irrelevant by their subsequent conduct.

Respectfully submitted,

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DATED: February 9, 1995

FILED
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(19)

No. 94-749

# In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHN J. HURLEY, INDIVIDUALLY, AND THE SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,
PETITIONERS,

*v.*

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, AN UNINCORPORATED ASSOCIATION, BY AND THROUGH TIMOTHY DALEY, BARBRA KAY, AND CATHLEEN FINN, ACTING ON THEIR OWN BEHALF AND ON BEHALF OF MEMBERS OF THE ASSOCIATION,
RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS.

## JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 24, 1994
CERTIORARI GRANTED JANUARY 6, 1995

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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
01/09/95 FOR THE COMMONWEALTH

SJC-06498

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON & others vs. CITY OF BOSTON

---

02/16/94 Entered.

03/11/94 ORDER: A majority of the Justices having concluded that there was no error below, the judgment of the Superior Court, dated December 24, 1993, is affirmed. Opinion or opinions to follow. Notice to counsel.

03/15/94 The Motion for Stay of Judgments and Order filed by the appellants, South Boston Allied War Veterans Council is denied. By the Court, Notice to counsel.

05/13/94 MOTION to Enlarge Time for Filing Petition for Rehearing until fourteen days after the issuance of the written decision in this appeal filed by the South Boston Allied War Veterans Council. ALLOWED. Notice to counsel.

07/11/94 Opinion issued. See docket entry #13 paper #12. Reasons as on file. Notice to counsel.

07/25/94 PETITION FOR REHEARING, filed for South Boston Allied War Veterans by Chester Darling, Esquire.

07/26/94 DENIAL of petition for rehearing. (By the Court) Notice to counsel.

A2

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK SUPERIOR COURT
CIVIL DOCKET

92-01518A

As of 01/12/95

*Irish-American Gay, Lesbian et al.* v. *Boston et al.*

| | |
|---|---|
| 03/10/92 | Complaint |
| 03/11/92 | ORDER (See P#3) (Zobel, J.) Fee Paid |
| 04/30/92 | ANSWER: John "Wacko" Hurley (Defendant) |
| 07/22/92 | ANSWER & Jury demand of defts. South Boston Allied War Veterans Council, Thomas Lyons, & Gene Vaillancourt (All issues) |
| 02/19/93 | MEMORANDUM & ORDER re: Parade on March 14, 1993. (Zobel, J.). Notice sent February 19, 1993 |
| 02/22/93 | Amended MEMORANDUM and ORDER re: Parade on March 14, 1993. (Zobel, J.). Feb. 22, 1993, *nunc pro tunc*, Feb. 19, 1992 Notice sent February 23, 1993 |
| 02/22/93 | Notice of Appeal of deft. The South Boston Allied War Veterans Council to Order dated February 19, 1993 |
| 12/15/93 | Findings: OF FACTS, RULINGS OF LAW & ORDER FOR JUDGMENT (Harold Flannery, Justice) Notice in hand 12/5/93 |
| 12/22/93 | Motion of deft, The South Boston Allied War Veterans Council, for leave to proceed on Appeal *in Forma Pauperis* |
| 12/22/93 | Motion of deft, The South Boston Allied War Veterans Council, for Relief from Judgment |
| 12/22/93 | Motion of deft, The South Boston Allied War Veterans Council, for Stay of Judgment |

12/22/93 Notice of appeal of deft, The South Boston Allied War Veterans Council

12/24/93 Motion of defts for lv to proceed on Appeal *in Forma Pauperis* denied without prejudice to renewal "for Cause Shown" as required by Mass. R. App. Prs. 12(a) (Flannery, J)

12/24/93 Motion of deft The South Boston Allied War Veterans Council for stay of Judgment denied. (Flannery, J)

12/24/93 Motion of deft The South Boston Allied War Veterans Council for Relief from Judgment denied. Flannery, J)

12/24/93 JUDGMENT 1. As to the plff GLIB's claims against deft City of Boston Judgment shall enter for the City and the claims are Dismissed; the City shall remain as a party in the action in order to ensure effective relief. 2. As to the deft Veteran's cross-claims against the deft City of Boston, Judgment shall enter for the City and the Cross-claims are dismissed. 3. The defts South Boston Allied War Veterans Council, John J. "Wacko" Hurley their officers agents servants employees attys and all other persons in active concert or participating with them who have actual notice of the Order: (a) are permanently enjoined from discriminating against the plff on the basis of sexual orientation with respect to participation in the deft's annual St. Patrick's / Evacuation Day Parade (b) shall accommodate in the parade in all respects representatives of the plff on the terms and conditions generally applicable to all other parade participants (Flannery, J), entered on docket pursuant to Mass. R. Civ. P. 58(a) and notice sent to parties pursuant to Mass. R. Civ. P. 77(d)

| | |
|---|---|
| 12/29/93 | Notice of appeal of defts John J. Hurley & the South Boston Allied War Veterans Council |
| 02/07/94 | Motion of defts to Modify the Record on appeal filing copies in lieu of missing originals and to supplement the record on appeal Allowed, subject to two conditions: (1) the other parties shall have a reasonable opportunity to verify authenticity, and (2) the appellants shall cooperate with respect to similar requests by another party (Flannery, J) |
| 04/14/94 | Rescript rec'd from SJC "A Majority of the Justices having concluded that there was no error below, the judgment of the Superior Court dated December 24, 1993, is affirmed" |
| 05/10/94 | JUDGMENT AFTER RESCRIPT (PURSUANT TO MASS. R.A.P. 28) That the Judgment of the lower court is affirmed entered on docket pursuant to Mass. R.Civ.P. 58(b) and notice sent to parties pursuant to Mass. R.Civ.P. 77(d) |
| 07/20/94 | Motion to vacate entry of judgment after rescript (w/o opposition) |

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

| | | |
|---|---|---|
| IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, an unincorporated association, by and through TIMOTHY DALEY and CATHLEEN FINN, acting on their own behalf and on behalf of the members of the association, Plaintiffs, | ) | |
| v. | ) | CIVIL ACTION No. 92-1518-A |
| CITY OF BOSTON, SOUTH BOSTON ALLIED WAR VETERANS COUNCIL, and JOHN J. "WACKO" HURLEY, individually and as a representative member on behalf of the South Boston Allied War Veterans Council, Defendants. | ) | |

PLAINTIFFS' SUPPLEMENTAL PLEADING
AND AMENDED COMPLAINT

*Introduction*

1. Plaintiffs' Gay, Lesbian and Bisexual Irish-American Group of Boston, Timothy Daley and Cathleen Finn bring this action to obtain declaratory and injunctive relief and damages for the violation of their right, under Massachusetts statutory

law, the Massachusetts Declaration of Rights, and the United States Constitution, to be free from invidious discrimination in a place of public accommodation, resort or amusement, and to remedy the violation of their right to freedom of expression and to equal protection of the laws.

2. Plaintiffs have applied for a parade registration form to register to march in the annual Evacuation Day/St. Patrick's Day Parade to be held on Sunday, March 14, 1993 in South Boston. Defendant South Boston Allied War Veterans Council has refused to provide Plaintiffs with a registration form and has stated that Plaintiffs will not be allowed to march in this year's Parade, despite the fact that Plaintiffs marched last year pursuant to Court order and in a peaceful and orderly manner.

3. Defendants South Boston Allied War Veterans Council and John J. "Wacko" Hurley, by refusing to allow the registration and participation of Plaintiffs in the 1993 Parade, have violated Massachusetts General Laws c. 272, sections 92A and 98, forbidding discrimination in a place of public accommodation, resort or amusement on the basis of sexual orientation.

4. Defendant City of Boston has aided and incited this violation of Massachusetts General Laws c. 272, sections 92A and 98, in violation of sections 92A and 98.

5. Defendant City of Boston, acting under color of law, has abridged Plaintiffs' rights, guaranteed by the First and Fourteenth Amendments of the United States Constitution and Articles 1 and 16 of the Massachusetts Declaration of Rights by denying Plaintiffs the right to register for and march in the annual Evacuation Day/St. Patrick's Day Parade based on the content of the message that Plaintiffs express.

**Parties**

6. Plaintiff Gay, Lesbian and Bisexual Irish-American Group of Boston ("GLIB") is an unincorporated association

based in Cambridge. GLIB is a social and cultural organization open to all gay men, lesbians and bisexuals of Irish descent and others interested in Irish and Irish-American issues. Among GLIB's purposes are the affirmation and celebration of the dual identity of its members as Irish-Americans who also share a gay, lesbian or bisexual identity. To that end, members of GLIB wish to register their organization and march in the 1993 Evacuation Day/St. Patrick's Day Parade.

7. Plaintiff Timothy Daley is a resident of Boston and a member of GLIB who wishes to march with GLIB in the upcoming Evacuation Day/St. Patrick's Day Parade.

8. Plaintiff Cathleen Finn is a resident of Somerville and a member of GLIB who wishes to march with GLIB in the upcoming Evacuation Day/St. Patrick's Day Parade.

9. Defendant City of Boston ("City") is a municipal corporation organized under the laws of the Commonwealth of Massachusetts. Together with the South Boston Allied War Veterans Council, it is the custom and policy of Defendant City to sponsor, organize, and promote the annual Evacuation Day/St. Patrick's Day Parade in South Boston.

10. Defendant South Boston Allied War Veterans Council ("Council") is, on information and belief, an unincorporated association which, in conjunction with Defendant City, sponsors, organizes, and promotes the annual Evacuation Day/St. Patrick's Day Parade.

11. Defendant John J. "Wacko" Hurley is Parade Adjutant for the 1993 Evacuation Day/St. Patrick's Day Parade ("Parade"). Upon information and belief, Defendant Hurley is responsible, *inter alia*, for the approval or rejection of applications for registration forms, and for the approval or rejection of registration forms submitted by groups that wish to march in the Parade.

**Facts**

12. Evacuation Day is an annual state holiday established in 1938 by Massachusetts General Laws c. 6, section 12K to celebrate George Washington's historic rousting of the British army from Boston in 1776.

13. In the City of Boston, Evacuation Day traditionally has been observed in conjunction with St. Patrick's Day. For many years, Defendant City and Defendant Council have cosponsored an annual Evacuation Day/St. Patrick's Day Parade that takes place on the streets of South Boston. In order to participate in the Parade, groups must register with the Defendants.

14. On or about the first week of January 1993, Plaintiff Daley wrote to Defendant Hurley requesting that Defendant Hurley send him a Parade registration form so that GLIB could register for and march in the 1993 Parade.

15. On January 11, 1993 Defendant Hurley sent a letter on behalf of Defendant Council to Plaintiff Daley informing him that his "request for a registration form to participate in the 1993 St. Patrick's Day/Evacuation Day Parade is denied." Exhibit A. On information and belief, Defendant Council has not refused to send the registration form to any other Irish-American group seeking to participate in the Parade.

16. Defendant Hurley's denial of Plaintiffs' request for a registration form was pursuant to a vote by Defendant Council not to "permit any group with any sexual themes to march" in the Parade. Exhibit B.

17. Defendants' refusal to allow GLIB to register to march in the Parade followed closely upon GLIB's request, made pursuant to the suggestion by this Court in December 1993 that the parties resolve this dispute without resort to the courts. Exhibit C.

18. Following Defendants' refusal to allow Plaintiffs to register to march in the 1993 Parade, Plaintiffs filed a complaint with the Massachusetts Commission Against Discrimination

("MCAD"). Exhibit D. On February 1, 1993 the MCAD issued Removal Letters permitting the Plaintiffs to pursue their discrimination claims in Superior Court. Exhibit E.

19. On or about December 23, 1992 Defendant City issued a conditional parade permit to Defendant Council. Without this permit, the Parade cannot take place. Moreover, upon information and belief, Defendant City has provided and continues to provide support and services to Defendant Council in its Parade organizing activities.

20. The 1993 Parade is a public accommodation in that it is a place of public amusement, entertainment, or resort. The Parade is open to and accepts the patronage of the general public. The 1993 Parade may reasonably be expected to draw in excess of 20,000 participants from diverse social, cultural, civic, religious, political, educational and historical organizations. The Parade regularly draws in excess of 750,000 spectators.

21. The Parade is a celebration of Evacuation Day, a state holiday, and traditionally has been a public function of Defendant City. Defendant City has delegated this public function, in part, to Defendant Council. The Parade is imbued with a governmental character because, *inter alia*, it celebrates the public holiday of Evacuation Day and because it is the only officially sanctioned public celebration of that holiday in the City of Boston.

22. For many years, it has been a custom and policy of Defendant City to associate its name and its service with the Parade. In 1992, the official Parade registration form described the Parade as the "City of Boston Evacuation Day Parade." The registration form for the 1992 Parade contained the official City of Boston seal and was produced in the City print shop. On information and belief, two employees of the City of Boston Veterans Services Department, identifying themselves as such, organized and administered the preparations for the Parade,

including the registration of participating groups, from their offices in City Hall and as part of their official duties.

23. Defendant City benefits from its custom and policy of cosponsorship and support of the Parade through the creation of tourist attractions, cultural celebrations, and historic commemorations relating to Evacuation Day and St. Patrick's Day, which foster Defendant City's international reputation and engenders good will among its citizens. The Parade is a unique public forum for expression within the City of Boston and the Commonwealth.

24. The Parade occurs exclusively on public highways, *i.e.*, the streets of South Boston.

25. The public streets upon which the Parade is held are a traditional public forum.

26. Defendants have had no established, regularly followed standards for determining which groups will be allowed to march in the Parade, other than payment of the required fee of $200.00 and completion of a registration form. There is no prohibition on political speech, nor is there any requirement that participating groups be Irish or Irish-Catholic. The 1992 Parade was dedicated to the themes of "Say No To Drugs," "The Armed Forces," and "World Peace."

27. Participants in the 1992 Parade included such diverse groups as the Teen-Aged Mutant Ninja Turtles, Massachusetts Citizens for Life, South Boston Against Drugs, Hallamore Clydesdale Horses, 98.5 MIX FM Radio Station, South Boston Baptist Bible Trolley, Miss South Boston, Miss Ice-O-Rama, Miss Jr. Ice-O-Rama, Put Americans to Work, Earth Day Marchers, the Wheelmen Antique Bicycles, New England Shelter for the Homeless, and the McGruff Crime Dog. Sponsors of floats and bands in the Parade included City of Boston Mayor Raymond Flynn, Congressman John J. Moakley, Massachusetts Senate President William Bulger, Boston City Councilor James Kelly, Sheriff Robert Rufo, Shubert's Smoke Shop,

Budweiser, Pepsi-Cola, Hub Video, the Mt. Washington Cooperative Bank, and the World Cross Country Championship Race Committee.

28. Plaintiffs marched in the 1992 Parade pursuant to this Court's Order of March 11, 1992. Plaintiffs fully complied with the terms of the Order, which included limiting their group to 25 participants, wearing easily recognizable insignia, carrying only one banner, not distributing pamphlets, objects or materials of any kind, working cooperatively with the Boston Police, and conducting themselves in a peaceful and orderly manner.

29. Despite Plaintiffs' exemplary conduct in the 1992 Parade, Defendants have denied Plaintiffs a registration form and refused to allow them to march in the 1993 Parade because of Plaintiffs' sexual orientation and because of the content of their expression.

30. Plaintiffs have no adequate remedy at law and will suffer immediate irreparable injury to their right to be free from invidious discrimination in a place of public accommodation, resort or amusement, and to their right to freedom of expression and to the equal protection of the laws if they are not allowed to participate in the Evacuation Day/St. Patrick's Day Parade on March 14, 1993.

## COUNT I

**Massachusetts General Laws c. 272, Sections 92A and 98**

31. Plaintiffs repeat and reallege paragraphs 1 through 30 as if each were fully set forth herein.

32. By denying Plaintiffs the right to register for and march in the 1993 Evacuation Day/St. Patrick's Day Parade based on Plaintiffs' sexual orientation, Defendants have deprived and aided and incited the deprivation of Plaintiffs' right to be free from invidious discrimination in a place of public accom-

modation in violation of Massachusetts General Laws c. 272, §§ 92A and 98.

## COUNT II

### First and Fourteenth Amendments, Article 16

33. Plaintiffs repeat and reallege paragraphs 1 through 32 as if each were fully set forth herein.

34. By denying Plaintiffs the right to register for and march in the 1983 Evacuation Day/St. Patrick's Day Parade based on the content of Plaintiffs' expression and the fact that GLIB's membership is comprised of gay men, lesbians, and bisexuals, Defendants, acting under color of state law, have deprived Plaintiffs of their right to freedom of expression in violation of the First and Fourteenth Amendments to the United States Constitution and Article 16 of the Massachusetts Declaration of Rights.

## COUNT III

### Fourteenth Amendment, Article 1

35. Plaintiffs repeat and reallege paragraphs 1 through 34 as if each were fully set forth herein.

36. By denying Plaintiffs the right to register for and march in the 1993 Evacuation Day/St. Patrick's Day Parade based on Plaintiffs' expression and the fact that GLIB's membership is comprised of gay men, lesbians and bisexuals, Defendants, acting under color of state law, have deprived Plaintiffs of their right to equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and Article 1 of the Massachusetts Declaration of Rights.

## PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs request that this Court grant the following relief:

1. An expedited discovery schedule to permit a full hearing on the merits of the Plaintiffs' claims prior to March 14, 1993, the date of the Parade, for the reasons set out in the accompanying Motion for Expedited Discovery;

2. A temporary restraining order, and preliminary and permanent injunctions ordering Defendants to permit Plaintiffs to register for and march in the Evacuation Day/St. Patrick's Day Parade on March 14, 1993 on an equal basis with other participants;

3. A declaratory judgment that the decision by Defendants not to allow Plaintiffs to register for and march in the 1993 Parade violated the right of Plaintiffs to be free from invidious discrimination in a place of public accommodation, resort or amusement, and violated the right of the Plaintiffs to freedom of expression and equal protection of the laws guaranteed by the First and Fourteenth Amendments to the United States Constitution and Articles 1 and 16 of the Massachusetts Declaration of Rights;

4. An order pursuant to Massachusetts General Laws c. 151B, section 5 that Defendants cease and desist their violation of Massachusetts General Laws, c. 272, section 92A and 98;

5. An award to Plaintiffs of the costs of this action, including reasonable attorneys fees and costs pursuant to 42 U.S.C. section 1988 and Massachusetts General Laws c. 151B, section 5; and

6. Such other and further relief as the Court deems just and appropriate.

By their attorneys,

JOHN WARD,
BBO #515860
ZALKIND & RODRIGUEZ
65a Atlantic Avenue
Boston, MA 02110
(617) 742-6020

MARY L. BONAUTO
BBO #549967
Gay and Lesbian Advocates
and Defenders
P.O. Box 218
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(617) 426-1350

GRETCHEN VAN NESS
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Jamaica Plain, MA 02130
(617) 522-5088

PHILIP A. CRONIN
BBO #106060
PEABODY & ARNOLD
50 Rowes Wharf
Boston, MA 02110
(617) 951-2100

Dated: February 2, 1993

[Certificate of Service omitted in printing]

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
DOCKET NO. 92-1518-A

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON,
Plaintiffs,

v.

CITY OF BOSTON, SOUTH BOSTON ALLIED WAR VETERANS COUNCIL, and JOHN J. "WACKO" HURLEY, individually and as a representative member on behalf of the South Boston Allied War Veterans Council,
Defendants.

## DEFENDANTS', SOUTH BOSTON ALLIED WAR VETERANS COUNCIL AND JOHN J. HURLEY, ANSWER TO PLAINTIFF'S AMENDED COMPLAINT AND CROSS CLAIM

The Defendants, South Boston Allied War Veterans Council and John J. Hurley (hereinafter referred to as the "Veterans"), answer the allegations in each paragraph of the Plaintiff's Amended Complaint dated February 2, 1993, as follows:

1. Defendants deny the allegations contained in paragraph 1 of the Plaintiff's Amended Complaint.

2. Defendants admit that the Plaintiffs were not sent a parade registration form for the March 14, 1993 St. Patrick's/Evacu-

tion Day Parade. Defendants deny the balance of the allegations contained in paragraph 2 of the Plaintiff's Amended Complaint.

3. Defendants deny the allegations contained in paragraph 3 of the Plaintiff's Amended Complaint.

4. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 4 of the Plaintiff's Amended Complaint and further deny that Defendants' actions were aided or influenced by Defendant, The City of Boston (hereinafter referred to as the "City").

5. Defendants are without knowledge as to the truth of the allegations contained in paragraph 5 of Plaintiff's Amended Complaint and further deny that Defendant, the City, participated in the decision of the Veterans to not provide the Plaintiff with a registration form for the March 14, 1993 St. Patrick's/ Evacuation Day Parade.

6. Defendants admit that Plaintiffs, The Irish-American Gay, Lesbian and Bisexual Group of Boston (hereinafter referred to as "GLIB") is an unincorporated association. Defendants are without knowledge or information to form a belief as to the balance of the allegations contained in paragraph 6 of the Plaintiffs Amended Complaint.

7. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 7 of the Plaintiff's Amended Complaint.

8. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 8 of the Plaintiff's Amended Complaint.

9. Defendants acknowledge that Defendant, the City, is a municipal corporation organized under the laws of the Commonwealth of Massachusetts. The Defendants deny the remaining allegations contained in paragraph 9 of the Plaintiff's Amended Complaint.

10. Defendants admit that the South Boston Allied War Veterans Council is an unincorporated association. The Defendants

deny the remaining allegations contained in paragraph 10 of the Plaintiff's Amended Complaint.

11. Defendants admit that John J. Hurley was the Parade Adjutant for the 1993 St. Patrick's/Evacuation Day Parade. Defendants deny the remaining allegations contained in paragraph 11 of the Plaintiff's Amended Complaint.

12. Defendants deny the allegations contained in paragraph 12 of the Plaintiff's Amended Complaint.

13. Defendants admit that Evacuation Day has traditionally been celebrated in conjunction with St. Patrick's Day. The Defendants deny the remaining allegations contained in paragraph 13 of the Plaintiff's Amended Complaint.

14. Defendants admit the allegations contained in paragraph 14 of the Plaintiff's Amended Complaint.

15. Defendants admit that they denied Plaintiff Daley's request for a registration form for the 1993 St. Patrick's/Evacuation Day Parade. Defendants deny the remainder of the allegations contained in paragraph 15 of the Plaintiff's Amended Complaint.

16. Defendants admit the allegations contained in paragraph 16 of Plaintiff's Amended Complaint.

17. Defendants generally admit the allegations contained in paragraph 17 of the Plaintiff's Amended Complaint.

18. Defendants admit the allegations contained in paragraph 18 of the Plaintiff's Amended Complaint.

19. Defendants admit that on or about December 13, 1993, Defendant, the City, issued a conditional parade permit. Defendants deny the remainder of the allegations contained in paragraph 19 of the Plaintiff's Amended Complaint.

20. Defendants admit that the St. Patrick's/Evacuation Day Parade attracts approximately 750,000 spectators each year. Defendants deny the remainder of the allegations contained in paragraph 20 of the Plaintiff's Amended Complaint.

21. Defendants deny the allegations contained in paragraph 21 of the Plaintiff's Amended Complaint.

22. Defendants admit utilizing the City seal of The City of Boston on its registration forms for the 1992 Parade which form incorporated the words "City of Boston Evacuation Day Parade." Defendants deny the remainder of the allegations contained in paragraph 22 of the Plaintiff's Amended Complaint.

23. Defendants are without sufficient knowledge or information to form a belief as to the general allegations contained in paragraph 23 of the Plaintiff's Amended Complaint and specifically deny the allegations of the "co-sponsorship of the Parade" as it may relate to the Defendants.

24. Defendants admit the allegations contained in paragraph 24 of the Plaintiff's Amended Complaint.

25. Defendants admit the allegations contained in paragraph 24 of the Plaintiff's Amended Complaint.

26. Defendants admit that the Parade contained themes of "Say No to Drugs", "The Armed Forces" and "World Peace". Defendants deny the remainder of the allegations contained in paragraph 26 of the Plaintiff's Amended Complaint.

27. Defendants admit the allegations contained in paragraph 27 of the Plaintiff's Amended Complaint.

28. Defendants admit the allegations contained in paragraph 28 of the Plaintiff's Amended Complaint.

29. Defendants deny the allegations contained in paragraph 29 of the Plaintiff's Amended Complaint.

30. Defendants deny the allegations contained in paragraph 30 of the Plaintiff's Amended Complaint.

31. Defendants repeat their answers of paragraphs 1 through 30 as if fully set forth herein.

32. Defendants deny the allegations contained in paragraph 32 of the Plaintiff's Amended Complaint.

33. Defendants repeat their answers of paragraphs 1 through 32 as if fully set forth herein.

34. Defendants deny the allegations contained in paragraph 34 of the Plaintiff's Amended Complaint.

35. Defendants repeat their answers of paragraphs 1 through 34 as if fully set forth herein.

36. Defendants deny the allegations contained in paragraph 36 of Plaintiff's Amended Complaint.

## FIRST AFFIRMATIVE DEFENSE

The Amended Complaint fails to state a claim against the Defendants upon which relief can be granted.

## SECOND AFFIRMATIVE DEFENSE

Plaintiffs are not entitled to maintain this action because of their laches. Plaintiffs had knowledge of all the acts of Defendants as set forth in Plaintiffs' Complaint. Nevertheless, Plaintiffs refrained from prosecuting their March 10, 1992 Complaint and waited until February 2, 1993 to file their Amended Complaint. In short, Plaintiffs sought to avoid a trial on the merits regarding the issues raised in their complaints. Plaintiffs' delay in filing their actions was to the detriment and prejudice of Defendants.

## THIRD AFFIRMATIVE DEFENSE

Plaintiffs' Amended Complaint seeks relief that is illegal as a matter of constitutional law.

WHEREFORE, for the foregoing reasons, Defendants respectfully pray that the Plaintiffs' Amended Complaint be dismissed.

## VETERANS' CROSS-CLAIM: CITY OF BOSTON

Defendants, South Boston Allied War Veterans Council and John J. Hurley (hereinafter referred to as the "Veterans") by way of cross-claim against the Defendant City of Boston (hereinafter referred to as the "City") say:

1. On March 11, 1992, this Court enjoined the Veterans and the City from interfering with the Plaintiff's participation in the March 15, 1992 St. Patrick's/Evacuation Day Parade.

2. On November 19, 1992, Richard A. Dimino, Commissioner of the Boston Transportation Department, wrote a letter to John J. Hurley invoking the "issues" that may arise regarding "participation" in the 1993 Parade and asking if the Parade Committee intended to conduct the 1993 Parade in a manner consistent with the Court's Order of March 11, 1992 concerning the parade. (See Exhibit #1, attached hereto).

3. On December 2, 1992, counsel for Defendants inquired of Commissioner Richard A. Dimino and Corporation Counsel Albert W. Wallis if the City of Boston intended to impose its judgment in determining who would be eligible to march with the Veterans in the 1993 parade. (See Exhibit #2, attached hereto).

4. On December 8, 1992, counsel for the Defendant wrote to the City of Boston Corporation Counsel seeking a response to his December 2, 1992 letter. (See Exhibit #3, attached hereto).

5. On December 10, 1992, the City sought to further influence the content of the Veterans' expression embodied in the 1993 Parade by seeking a judicial "clarification" of the Court's Order of March 11, 1992 as it would apply to the prospective 1993 Parade and still withheld the issuance of the 1993 Parade permit to the Veterans.

6. On December 16, 1992, Deputy Commissioner William J. Good, III, wrote to counsel for the Defendants invoking the issue of "participation" and inappropriately invoking anti-discrimination laws. (See Exhibit #4, attached hereto).

7. On December 23, 1993, the Boston Transportation Department issued a parade permit to the Veterans, the same day the MCAD issued a press release announcing that the MCAD hearing officer scheduled to hear a 1992 discrimination com-

plaint, was authorized to order gays and lesbians to march in the 1993 parade.

8. The City, its affiliates, agents and servants engaged in an extended suppression, interference with, and chilling of the Veterans' speech.

## COUNT I
## (42 U.S.C., Sec. 1983; FIRST AND FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLES 1, 12, 16 AND 19 OF THE MASSACHUSETTS DECLARATION OF RIGHTS)

9. The Veterans repeat, reallege, and incorporate the allegations contained in paragraphs 1 through 8 of their Cross-Claim as if fully set forth herein.

10. By its actions, the City, acting under color of state and municipal law, by issuing a parade permit to the Veterans, coupled with its court action and inappropriate invocation of the Commonwealth's anti-discrimination laws, has deprived, interfered with, and chilled the speech of the Veterans, thereby depriving the Veterans and other prospective participants of the perspective 1993 Parade, of their rights to freedom of speech, association, assembly, free exercise of religion and equal protection of the laws in violation of the First and Fourteenth Amendments of the U.S. Constitution, 42 U.S.C., Sec. 1983, and Articles 1, 12, 16, and 19 of the Massachusetts Declaration of Rights.

## COUNT II
## (MASSACHUSETTS CIVIL RIGHTS ACT)

11. The Veterans repeat, reallege, and incorporate the allegations contained in paragraphs 1 through 10 of their Cross-Claim as if fully set forth herein.

12. The City, by its rejection and delays in issuing a parade permit to the Veterans, coupled with its court action and inap-

propriate invocation of the Commonwealth's anti-discrimination laws, interfered with, deprived, and chilled the Veterans' rights of freedom of speech, assembly, and association, which rights are secured by the U.S. and the Massachusetts Constitutions. Furthermore, the Veterans' right to free exercise of religion and equal protection were also interfered with by means of threats, intimidation or coercion in violation of the Massachusetts Civil Rights Act, G.L. c. 12, Secs. 11H and L.

WHEREFORE, the Veterans request that this Honorable Court grant the following relief:

A. A preliminary and permanent injunction issue ordering that the City of Boston not interfere with the secured Federal and State Constitutional rights of the Veterans by attempting to control, in any way, the content of the Veterans' speech embodied in future parades organized by the Veterans;

B. An award to the Veterans of the costs of this action, damages for injuries and reasonable attorneys fees pursuant to 42 U.S.C., Sec. 1988 and M.G.L. c. 12, Secs. 11 I; and

C. Such other and further relief as this Court deems appropriate.

Respectfully submitted,

SOUTH BOSTON ALLIED WAR VETERANS COUNCIL and JOHN J. "WACKO" HURLEY,
*By Their Attorney*

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CHESTER DARLING
306 Dartmouth Street
Boston, MA 02116
(617) 536-2050
B.B.O. #114320

Dated: April 16, 1993

# OFFICIAL ROSTER

## EVACUATION AND ST. PATRICK'S DAY PARADE
## SUNDAY, MARCH 15, 1992

**Coordinated by**
**HON. RAYMOND L. FLYNN, Mayor of Boston**
**Mayor's Office of Business and Cultural Development**
**Rosemarie E. Sansone, Director**
**and**
**The Allied War Veterans Council of South Boston**

**Starting Point of Parade, Broadway Station, South Boston**

**HEADQUARTERS OF CHIEF MARSHAL**
P.O. Box 351
South Boston, MA 02127
268-8525

**GENERAL ORDER NO. 1**

The following is published for the information and guidance of troops and organizations participating in the Evacuation and St. Patrick's Day Parade, to be held in South Boston, Massachusetts, on the afternoon of Sunday, March 15, 1992.

CHIEF MARSHAL
**Thomas J. Lyons**

CHIEF OF STAFF
**John J. "Wacko" Hurley**

ADJUTANT
**Gene Vaillancourt**

OFFICERS OF THE DAY
**Francis J. Guerriero**
**Joseph J. Dillon**
**Wendell G. Penney**

TRANSPORTATION OFFICER
**Bronis L. Kontrim**

HONORARY CHIEF MARSHALS

HON. RAYMOND L. FLYNN
HON. WILLIAM M. BULGER
ALFRED W. ARCHIBALD
JAMES H. WEBB
GEN. RICHARD NEAL, USMC
HON. JOHN J. MOAKLEY, M.C.
CHARLES A. MACGILLIVARY, C.M.H.
JOHN FALES, BVA
MICHAEL "MAC" MCGARVEY
A. RAYMOND TYE

PARADE COORDINATORS
PATRICK DILLON
EDWARD SHIFFLETT

CHIEF LIAISON OFFICER
CHARLES LENANE

MILITARY AFFAIRS COORDINATOR
MAJOR ROBERT WEINERS, USMC

DEPUTY LIAISON OFFICERS

WAYNE FONTES
KEVIN KELLY
SANDY SOUTHWICK
FRANK L. TABBI
SCOTT REEHM
JAMES RIGBY
BETTY WALKER
DAVID SOUTHWICK
MIKE TOGNARELLI
STEPHEN HAWKER

**GENERAL ORDER NO. 1 — Continued**

MIKE THOMPSON
LEONARD J. WALSH, JR.
STEPHEN "MIKE" COTTER
MIKE JOYCE
JAMES J. DUFFY
RONNY BRYANT

FLOAT COORDINATORS
KEVIN DILLON
JOHN JOYCE

CHIEF OF PROTOCOL OFFICER
"JOCKO" ANANIAN

OFFICIAL MEDICAL STAFF
ALAN PINEDA, M.D.
MARY PINEDA, M.D.

CHIEF AIDES DE CAMP
PAUL ARCHIBALD
RICHARD LAINE
TOM MATERAZZO
JOHN DAY
BILL POWERS
JOSEPH ALECKS
ALBERT DONNELLY

PERSONAL AIDES TO CHIEF MARSHAL
BILL KNOX
JERRY TURNER
JOHN KARINSKA
GEORGE EGAN
HENRY CARROLL
JOE WALKER

AIDES TO CHIEF MARSHAL
PAUL MCDONOUGH
JOE MANNING
KEVIN O'NEILL

## ASSISTANT CHIEFS OF STAFF

SIDNEY PENNEY
ROBERT MOAKLEY
EDWARD "BUTCH" REEVES
JAMES "FOXY" MARCIELLO

## DEPUTY CHIEFS OF STAFF

COMMISSIONER FRANCIS M. ROACHE, B.P.D.
SUPERINTENDENT-IN-CHIEF WILLIAM BRATTON, B.P.D.
SUPERINTENDENT THOMAS P. MALONEY, B.P.D.
SUPERINTENDENT PAUL EVANS, B.P.D.
DEPUTY SUPERINTENDENT PAUL BANKOWSKI, B.P.D.
DEPUTY SUPERINTENDENT BOB FAHERTY, B.P.D.
CAPTAIN TOM CROWLEY, B.P.D.
CAPTAIN CHARLES MCCARTHY, M.D.C.
COMMISSIONER MARTIN PIERCE, JR., B.F.D.
CHIEF JOHN R. DONOVAN, MBTA P.D.

## HONORARY ASSISTANT CHIEFS OF STAFF

DEPARTMENT COMMANDER, V.F.W., WILLIAM J. MADERA
DEPARTMENT COMMANDER, A.L., JOSEPH D. CRIMMONS
DEPARTMENT COMMANDER, D.A.V., JAMES TANNER

## HONORARY OFFICERS OF THE DAY

DEPARTMENT ADJUTANT, V.F.W., GORDON CROSBY
DEPARTMENT ADJUTANT, A.L., DOMINIC GINNETTI
DEPARTMENT ADJUTANT, D.A.V., JOSEPH R. HAROLD

## HONORARY TRANSPORTATION OFFICERS

JOHN E. POWERS, JR.
DEREK BOYLE
JOHN HALEY, JR.
JOE AIELLO
CAROLYN WYLDER

## PUBLIC RELATIONS OFFICERS

PETER GELZINIS
BRIAN WALLACE
WALTER M. CLARK
BOB MONAHAN

## PARADE CHAPLAIN

RT. REV. JOHN R. MCNAMARA, REAR ADMIRAL, USN, RET.

## ASSISTANT PARADE CHAPLAINS

REV. AIDIAN DUFFY, LT. COL., U.S. ARMY, RET.

REV. THOMAS MCDONALD
REV. GILBERT PHINN
REV. ALFRED PUCCINI
REV. THOMAS J. REILLY
REV. RICHARD CANNON
REV. MICHAEL STEBLE
REV. JOHN DOOHER
REV. MICHAEL DOYLE
REV. JOHN SULLIVAN

## CITY HALL LIAISONS

JOSEPH FISHER
DOMENIC D'AMBROSIO
ANN THERESA DWYER
JOHN O'SULLIVAN

## COMMANDER, ALLIED WAR VETERANS COUNCIL OF SOUTH BOSTON

ELEANOR TOBIN HULAK

## PAST COMMANDERS, ALLIED WAR VETERANS COUNCIL OF SOUTH BOSTON

ALBERT J. F. FORD
ROBERT CROWLEY
JOHN T. TYNAN
THOMAS J. FARLEY
JOSEPH W. WALKER
J. HENRY BOCH
WALTER K. EUGLEY
CHARLES B. PECK
WALTER J. DWYER
BERNARD N. PANAJIA
JOHN F. DONOVAN
JOHN J. HURLEY
WALTER M. CLARK
GEORGE F. KING
PATRICK F. SHEEHAN
ERNEST MAESTRANZI
JOHN J. CASSELL
GILBERT HOOPER
VINCENT A. MCCARTHY
LOUIS A. BAZZINOTTI
J. PAUL IVERS
JOHN H. NEAS, JR.
ROBERT J. GIFFORD
JOHN KARINSKA
RICHARD MCDONALD
JOHN J. MALONEY

FRED A. MARINI
BETTY WALKER
FRANCIS GUERRIERO
THOMAS J. LYONS
MICHAEL J. COYNE
CHARLES SEYMOUR
EDMUND L. KETVIRTIS
DAVID J. BREADMORE
JOSEPH C. LEE
DONALD R. CLORAN
ROBERT JOYCE
JOHN ZEBRIS
JOSEPH L. DILLON
PAUL L. ROGERS
MICHAEL J. LINEHAN
HAROLD EPSTIN
JOHN J. MCSWEENEY
JOSEPH ALECKS
EDWARD CONNOLLY
ARNOLD E. MCGEE
BRONIS L. KONTRIM
ALBERT G. PROSSER
THOMAS P. BEGGAN

## PAST CHIEF MARSHALS
## ALLIED WAR VETERANS COUNCIL

1948 CHARLES A. MACGILLIVARY
1949 JOSEPH REARDON
1950 JOHN T. TYNAN
*1951 MICHAEL J. COYNE
1952 CARMINE PRIOLI
*1953 HAROLD EPSTIN
*1954 PATRICK F. SHEEHAN
1955 JOSEPH ALECKS
*1956 JUDGE JOSEPH F. FEENEY
*1957 JOHN CASSELL -
1958 JOHN MCSWEENEY
*1959 J. HENRY BOCH
*1960 JOHN J. MCDONOUGH
1961 ALFRED T. DUNCAN
1962 EDMUND L. KETVIRTIS
1963 JOSEPH W. WALKER
1964 JOHN J. "WACKO" HURLEY
*1965 CHARLES B. PECK
*1966 WILLIAM J. CASEY
1967 DAVID J. BREADMORE
*1968 EDWARD C. CONNOLLY
1969 WALTER M. CLARK
1970 BRONIS L. KONTRIM
*1971 WALTER J. DWYER
*1972 PAUL L. ROGERS
1973 JOHN H. NEAS, JR.
*1974 BERNARD N. PANAJIA
*1975 ROBERT J. GIFFORD
*1976 ARNOLD E. MCGEE
1977 JOHN F. DONOVAN
1978 JOHN KARINSKA
1979 JOSEPH C. LEE
1980 THOMAS P. BEGGAN
1981 ELIZABETH WALKER
1982 FRED A. MARINI
*1983 GEORGE (SPOT) RYAN
1984 DONALD R. CLORAN
1985 ROBERT E. JOYCE

1986 Joseph L. Dillon
1987 Albert G. Prosser
1988 Frank J. Guerriero
1989 Wendell G. Penney
1991 Michael F. Flaherty

*Deceased

## POST COMMANDERS
## ALLIED WAR VETERANS COUNCIL OF SOUTH BOSTON

Thomas J. Fitzgerald Post 561, V.F.W., Thomas C. Martin
Thaddeus Kosciuszko Post 2091, V.F.W., Henry Zablocki
South Boston Post 6536, V.F.W., David P. Broderick
Michael J. Perkins Post 67, A.L., Gene Vaillancourt
Stephen J. Darius Post 317, A.L., John Karinska
Martin F. McDonough Post 368, A.L., Edward Sloane
Paul J. Saunders Post 383, A.L., Thomas Gavaghan
South Boston Memorial Chapter 22, D.A.V., Frank Daly

## HONORARY JUDGE ADVOCATES

Hon. John McGonigle
Hon. Paul Gannon
Hon. James Kelly
Hon. Jim Brett
Hon. Albert "Dapper" O'Neil
Hon. Robert Rufo

## AD BOOK CHAIRMAN

Joseph Manning

## BANQUET CHAIRMAN

Albert Prosser

## RADIO COMMUNICATION

Metro Motorist React Team

I would like to thank all the residents and merchants, who, through their support, made this parade possible. To them we are grateful. A special tip of the hat to Councillor Jim Kelly who set up several meetings with the BPD, MDC PD, MBTA PD, and interested and sincere South Boston people

who took the time to insure a celebration with pride. Also to station WROL who helped raise money from their listening audience of the "IRISH HOUR". A special thanks to Domenic D'Ambrosio of Business and Cultural Development Department, City of Boston, for months of dedicated service to the parade. Without his efforts we could not have the parade we have today. The entire effort and support of Mayor Ray Flynn has been the very best that we, in the Allied War Veterans Council, have ever had and we salute him on behalf of all veterans.

GENE VAILLANCOURT,
Parade Adjudant

## STAFF

| | | |
|---|---|---|
| Brian Wallace | Brian Miller | John Higgins |
| Dave Mann | Jack Donahue | John Mahoney |
| Frank Daly | Robert J. Keough | Carol Hrozenchik |
| Tommy Butler | Thomas F. Gavaghan | Francis X. O'Brien |
| John Sullivan | Leo Comeau | Howard Resnick |
| Billy Driscoll | Kevin Dillon | Debbie Mahoney |
| John J. Hurley, Jr. | Steve Barlow | Robert Jenkins |
| Gene Vaillincourt | Patrick J. Loftus II | Kerry Leydon |
| Tom Delaney | "Doc" Savage | Lisa Martin |
| Michael McDonough | Michael P. Hurley | Susan Slattery |
| Joe McDavitt | Mark A. Chace | Ellen Spring |
| Ruth Bolger | Raymond Fuschetti | Ginnie St. Cyr |
| Paul Walkowski | Jack Dalziel | Marie Mucci O'Shea |
| Tom McCauley | Ed "Butch" Reeves | Buddy Mangini |
| Bill Delaney | John Begley | Shira Goldman |
| Patrick Hurley | Edward Cloherty | Mike Testa |
| Bob Silvey | Tom Walsh | Patti Sartori |
| Tom O'Connell | Donald A. Gillis | Willie Horan |
| Lennie Hardy | Marty Barry | Joe Hogan |
| Harvey Allen | Jim O'Leary | Trish Flaherty |

## IN MEMORIAM

| | | |
|---|---|---|
| THOMAS J. LYONS, SR. | JOHN G. CALLNAN | DET. THOMAS GILL, B.P.D. |
| LT. PAUL LENTINI, B.F.D. | STANLEY GREELEY | JOHN CALLA |
| JIMMY NEE | STEPHEN JOYCE | KENNETH NORTON |
| JEREMIAH HURLY, B.P.D. | ROBERT NOONAN | WALTER J. DWYER |
| MARYANN SHANNON | MARIE MCDONOUGH | ED QUINLAN |

## PARADE FORMATION

---

## ORGANIZATION OF UNITS

---

### STAFF AND MILITARY DIVISION
**(Assembly on West 2nd Street)**

Boston Fire Department Vehicles
Boston EMS Vehicles
Mounted Detail, Boston Police Department
Mounted Detail, Boston Parks Department
U.S. Marine Corps Color Guard
Chief Marshal, Thomas J. Lyons
- U.S. Marine Corps Band, Albany Georgia

Chief of Staff, John J. "Wacko" Hurley
Parade Adjutant, Gene Vaillancourt
Officers of the Day:
- Frank Guerriero
- Joseph L. Dillon
- Wendell G. Penney

- United States Army, 18th Army Band and Color Guard, Fort Devens, MA
  Boston Fire Department Color Guard
  Boston Police Department Color Guard
  Honorable Raymond L. Flynn, Mayor of Boston
  with U.S. military leaders:
  Major General Wayne F. Wagner; General Richard Neal, USMC
  Rear Admiral Peter H. Cressy, USN; General John White, USAF
  Read Admiral Joel Sipes, USCG
- Joseph Hill Post, A.L., #156, Sponsored by Mayor Raymond L. Flynn
  Parade Chaplain, Rt. Rev. John R. McNamara, USN, Ret.
  George L. Street, USN, Ret., Congressional Medal of Honor
  Thomas J. Hudner, USN, Ret., Congressional Medal of Honor
  Hon. John J. Moakley, M.C.
- Troy High School Marching Band, Troy, NY
  Sponsored by Congressman John J. Moakley
  McDonough Post, American Legion, Post #368 Color Guard
  Commander Eleanor Tobin Hulak, Allied War Veterans Council
  Past Commanders, Allied War Veterans Council and Staff
  102nd FIN, Army National Guard
- 26th Yankee Division Band, Massachusetts National Guard
  101st Infantry, Massachusetts National Guard
  South Boston Vietnam Memorial Float
  U.S.S. Constitution Color Guard and Pikemen
  U.S. Navy Color Guard
  U.S. Navy Troops, U.S.S. Leyte Gulf
  U.S. Air Force Color Guard
  U.S. Coast Guard Color Guard
- Massachusetts Maritime Academy Regimental Band and Honor Guard
  U.S. Marines, South Weymouth
  Boston University, Marine and Navy R.O.T.C.
  West Roxbury High School Naval J.R.O.T.C.
  Charlestown High School Air Force J.R.O.T.C.
  Fort Devens M-68 Tanks and Military Vehicles
  U.S. 25th Marines Marching Brigade

BEST AVAILABLE COPY

## FIRST DIVISION

**(Assembly inside Gillette Company parking lot**
**Floats line-up on Dorchester Avenue)**

- Colonial Boys of Norwood
  Sponsored by Senate President William M. Bulger
  Patriot Missile, Raytheon Corporation
  South Boston Against Drugs Float
- Marshfield High School Band
  Sponsored by City Councillor Jimmy Kelly
  Hallamore Clydesdale Horses, Holbrook, MA
  South Boston Neighborhood House Senior Citizen Trolley Float
  Marion Manor Seniors Float
  98.5 Mix FM Radio, WBMX Van
- Westborough High School Marching Band
  Sponsored by State Representative Paul Gannon
  Leukemia Society Car with City Councillor Albert "Dapper" O'Neil
  POW/MIA Float, Flag and Marchers
  Vietnam Era Veterans, Somerville
  New England Shelter for Homeless Veterans Color Guard
- Colonial Bagpipe Band
  Rosaria Salerno, Boston City Councillor
  EDIC Balloon Float
  South Boston Baptist Bible Trolley Float
  South Boston Little League
- Central Academy Marching, Band, Springfield
  Sponsored by Castle Island Association
  Irish Malden Leprechaun Float
  Princemen Singing Group Float
  Sponsored by Budweiser
  City Councillor John Nucci
- Springfield Central High School Band
  Reading Youth Baton Squad
  Massachusetts State Police
  M.D.C. Color Guard and Vehicles

Suffolk County Sheriff's Department and Vehicles
Sponsored by Sheriff Robert Rufo
MBTA Color Guard, Vehicles and McGruff Crime Dog
Boston Municipal Police Department
National Parks Service Rangers and Vehicles
Irish Police Marchers
- Wolcott High School Eagles Band, Wolcott, Connecticut
Sponsored by World Cross Country Championship Race Committee
WZOU 94.5 FM Trolleys, Floats
Sponsored by Houlihans and Irish Mist
- North Attleboro High School Band
Sponsored by Shubert's Smoke Shop
Irish Basketball Players
Irish Currah Rowing Club Float
South Boston Community Health Center Van Float
South Boston Residents Group

**SECOND DIVISION**
**(Assembly inside Gillette Company parking lot**
**Floats line-up on Dorchester Avenue)**

South Boston Citizens Association, Bernie O'Donnell, President
Miss South Boston, Miss Ice-O-Rama, Miss Jr. Ice-O-Rama
Lexington Minutemen
Sponsored by Hub Video
AFL-CIO Trolley Float and Marchers
WZLX 100.7 FM Float
Medway High School Band
Sponsored by Pepsi-Cola "Gotta Have It"
V.F.W. Groups
American Legion Groups
D.A.V. Groups
E.P. Clark American Legion Color Guard with Model T Ford
Tin Can Sailors
Westbrook Fife and Drums
Sponsored by Perkins Post

- Acton-Boxborough High School Band
  Sponsored by South Boston Savings Bank
  WAAF 107 FM Rock Bus and Marchers
  The Wheelmen Antique Bicycles, Charlton, Massachusetts
  Ancient Order of Hibernians Truck Float
- Attleboro High School Band
  Sponsored by Mt. Washington Cooperative Bank
  Reading Youth Baton Squad
- Braintree Braves Drum Corps
  Middlesex J. Fife and Drums
  Frank Moynihan Disk Jockey Trolley Float
  NORAD/Currans Trolley, Float and Marchers
- Colonial Band of Lawrence
  Sponsored by Amrheins Restaurant
  Mass. Citizens for Life
- Immaculate Heart of Mary Band and Float
  Put America to Work Float

**THIRD DIVISION**
**(Assembly inside Gillette Company parking lot**
**Floats line-up on Dorchester Avenue)**

- Whitman-Hanson High School Band
  Sponsored by Irish American Society of South Boston
  Salem, N.H. Joeys Clowns and Float
  Cartoon Characters
  Sponsored by Hub Video and The Quietman Pub
- Holy Name Band, West Roxbury, MA
  Michelle Victoria, Suffolk County Jr. Miss
- St. Patrick's Ladies Pipe Band, Nashua, N.H.
  Sponsored by Burke Distributors
  Regiment de Saintonge
- Lowell High School Band
  Sponsored by The Blackthorne Pub
  28th Mass. Volunteer Regiment, Civil War Marchers

9th Mass. Volunteer Regiment
Nathanial Warner Militia
- Dedham High School Band

Earth Day Marchers
- Lincoln High School Band, Warwick, R.I.

## GENERAL ORDERS

The parade will start promptly at 12:45 P.M., and proceed up West Broadway at 1:00 P.M. The Chief Marshal and Staff Band will report to the Parade Coordinator at this site no later than 12:15 P.M.

The various commands will report to points designated to their respective positions. Reporting to Parade Coordinators.

The Mayor and his guests will review the parade from the stand on Broadway, between G and H Streets. The Gold Star Mothers will review the parade from the reviewing stand at O Street and East Fourth Street.

The Chief Marshal and his Staff will review the parade from the stand at Dorchester Street beyond Old Colony Avenue.

All Divisions will form on Dorchester Avenue and Gillette Parking Lot, behind the Staff.

All floats will form on Dorchester Avenue, near MBTA Station.

## ROUTE OF PARADE

Parade starts at 12:45 P.M., proceeds up West Broadway, to East Broadway, to P Street, up P Street to East Fourth Street, to K Street, up K Street to East Fifth Street, to I Street, up I Street to East Fourth Street, to G Street, to Thomas Park, to Telegraph Street, to Dorchester Street, to Andrew Square, point of dismissal.

Uniforms as prescribed by Organization Commanders. Rate of march 120 steps per minute. Liaison Officers and Parade Coordinators are instructed not to permit too wide a gap between organizations: 50 (fifty) yards distance is the maximum.

By order of
THOMAS J. LYONS
*Chief Marshal.*

OFFICIAL
GENE VAILLANCOURT
*Parade Adjudant.*
These orders SUBJECT TO CHANGE as conditions warrant.

Special thanks to BNN Access Cable for their cooperation in televising this event.

SAY "NO" TO DRUGS,
AND WE ALL PRAY FOR WORLD PEACE

CITY OF BOSTON PRINTING SECTION

# OFFICIAL ROSTER

## Evacuation Day and St. Patrick's Day Parade

## Sunday, March 14, 1993

*Sponsored by*
Allied War Veterans Council of South Boston
Starting point of Parade, Broadway Station, South Boston

Headquarters, Chief Marshal
P.O. Box 351
South Boston, MA 02127

General Order No. 1

The following is published for the information and guidance of troops and organizations participating in the Evacuation Day and St. Patrick's Day Parade to be held in South Boston, Massachusetts, on the afternoon of Sunday, March 14, 1993, at 1300 hours.

*Chief Marshal*
Eleanor Tobin-Hulak

*Chief of Staff*
Patrick Dillon

*Adjutant*
John J. "WACKO" Hurley

*Assistant Adjutant*
Frank "Chuck" Mayo

*Officers of the Day*
Francis J. Guerriero
Joseph J. Dillon
Wendell G. Penney

*Transportation*
Stephen Hawker

*Honorary Chief Marshals*

Hon. Raymond L. Flynn
Hon. William M. Bulger
Dr. William Reid
Hon. John J. Moakley, M.C.
Charles A. MacGillivary, C.M.H.
John Doran, B.P.D. (Ret.)
Councillor James Kelly

*Parade Co-Ordinator*
Edward Shifflett

*Military Co-Ordinator*
Michael D. Hurley

*Deputy Liaison Officers*

*Sandy Southwich*
*Frank L. Tabbi*
*Scott Rehm*
*Mike Tognarelli*
*Mike Joyce*
*Stephen "Mike" Cotter*
*James Rigby*
*Betty Walker*
*David Southwich*
*Mike Thompson*
*James J. Duffy*
*Ronny Bryant*

*Float Co-Ordinators*
Kevin Dillon
John Joyce

*Chief Protocol Officers*
"Jocko" Ananaian

*Honorary Chief of Staff*
Michael Hulak
Thomas Hulak

*Chief Aides-de-Camp*

Paul Archibald
Richard Laine
Tom Materazzo
Al Donnelly
John Day
Bill Powers
Joseph Alecks
Jack Forbush

*Personal Aides to Chief Marshal*
Michael Donovan
Patricia Hulak
Sis Joyce

*Aides to Chief Marshal*
Albert Lewandoski
Kevin O'Neill

*Assistant Chiefs of Staff*
Robert Moakley
Edward "Butch" Reeves
Derek Boyle

*Deputy Chiefs of Staff*
Commissioner Francis M. Roache, B.P.D.
Superintendent Paul Evans, B.P.D.
Deputy Superintendent, Paul Bankowski, B.P.D.
Deputy Superintendent, Bob Faherty, B.P.D.
Captain Tom Crowley, B.P.D.
Captain Charles McCarthy, State Police
Commissioner Martin Pierce, B.F.D.
Chief John O'Donovan, MBTA P.D.

*Honorary Officers of the Day*
Department Commander, V.F.W., Walter Gansenverg
Department Commander, A.L. Nick D'Alessandro
Department Commander, D.A.V. Frank J. Drogo

*Public Relations Officers*
Dan Horgan
John Ciccone
Walter M. Clark
Eddy Rogers
Alice O'Leary

*Parade Chaplain*
Reverend John P. Culloty

*Assistant Parade Chaplains*

Rev. Aidian Duffy, Lt. Col.
Rev. Gilbert Phinn
Rev. Richard Cannon
Rev. John Dooher
Rev. Michael Doyle
Rev. Thomas McDonnell
Rev. Thomas J. Reilly
Rev. Michael Steele
Rev. John Sullivan

*Honorary Transportations Officer*

Bronis L. Kontrim

*Past Chief Marshals*
*Allied War Veterans Council*

1948 Charles A. MacGillivary
1949 Joseph Reardon
1950 John T. Tynan
*1951 Michael J. Coyne
1952 Carmine Prioli
*1953 Harold Epstin
*1954 Patrick F. Sheehan
1955 Joseph Alecks
*1956 Judge Joseph F. Feeney
*1957 John Cassell
1958 John McSweeney
*1959 J. Henry Boch
*1960 John J. McDonough
1961 Alfred T. Duncan
1962 Edmund L. Ketvirtis
1963 Joseph W. Walker
1964 John J. "Wacko" Hurley
*1965 Charles B. Peck
*1966 William J. Casey
1967 David J. Breadmore
*1968 Edward C. Connolly
1969 Walter M. Clark
1970 Bronis L. Kontrim
*1971 Walter J. Dwyer
*1972 Paul L. Rogers
1973 John H. Neas, Jr.
*1974 Bernard N. Panajia
*1975 Robert J. Gifford
*1976 Arnold E. McGee
1977 John F. Donovan
1978 John Karinska
1979 Joseph C. Lee
1980 Thomas P. Beggan
1981 Elizabeth Walker
1982 Fred A. Marini
*1983 George (Spot) Ryan
1984 Donald R. Cloran
1985 Robert E. Joyce
1986 Joseph L. Dillon
1987 Albert G. Prosser
1988 Frank J. Guerriero
1989 Wendell G. Penney
1991 Michael F. Flaherty

*Deceased

*Commander, Allied War Veterans Council of South Boston*
Francis Daly

*Past Commanders*
*Allied War Veterans Council of South Boston*

* Albert J. F. Ford
Robert Crowley
John T. Tynan
Thomas J. Farley
Joseph W. Walker
* J. Henry Boch
Walter K. Eugley
* Charles B. Peck
* Walter J. Dwyer
* Bernard N. Panajia
John F. Donovan
John J. "Wacko" Hurley
Walter M. Clark
Fred A. Marini
Betty Walker
Francis Guerriero
Thomas Lyons
* Harold Epstin
John J. McSweeney
Joseph Alecks
* Edward Connolly
* Arnold E. McGee
Bronis L. Kontrim
Albert G. Prosser
Thomas P. Beggan
* George F. King
* Patrick F. Sheehan
* Ernest Maestranzi
* John J. Cassell
* Gilbert Hooper
Vincent A. McCarthy
Louis A. Bazzinotti
* J. Paul Ivers
John H. Neas, Jr.
* Robert J. Gifford
John Karinska
Richard McDonald
* John J. Maloney
Joseph L. Dillon
* Paul L. Rogers
Michael J. Lineuan
Eleanor T. Hulak
* Michael J. Coyne
* Charles Seymour
Edmund L. Ketvirtis
David J. Breadmore
Joseph C. Lee
Donald R. Cloran
Robert Joyce
John Zebris

*Allied War Veterans Council of South Boston*
*Commanders*

Thomas J. Fitzgerald, VFW, Thomas Martin
Thaddeus Kosciuszko Post 2091, Henry Zablocki
South Boston Post 6536, VFW, William Jones
Stephen Darius Post 317, A.L. John Karinska
Martin F. McDonough Post 368, A.L. Robert "TOP" Gooch
Paul J. Saunders Post 383, A.L. Patrick Dillon
South Boston Memorial Chapter 22, D.A.V., Ted Gavaghan

*Honorary Judge Advocates*

Honorable James Brett
Honorable Robert Rufo
Chester Darling
John E. Powers, Jr.
Honorable Paul Gannon
Honorable Albert "Dapper" O'Neil
John E. Powers
John E. Powers, III

*Ad Book Chairman*
Leo Comeau

*Banquet Chairman*
Joseph "Jay" Lee

*Radio Communications*
Metro Motorist React Team

I would like to thank all the residents and merchants, who, through their support, made this parade possible. To them we are grateful. A special tip of the hat to Councillor Jim Kelly who set up several meetings with the BPD, State Police PD, MBTA PD, and interested and sincere South Boston people who took the time to insure a celebration with pride. Also to station WROL who helped raise money from their listening audience of the "IRISH HOUR".

Harvey Allen
Helen Allix
Marty Barry
John Begley
Ruth Bolger
Tommy Butler
Jack Dalziel
Tom Delaney
Bill Delaney
Jack Donohue
Billy Driscoll
Ted Gavaghan
John Higgins
Willie Horan
Carol Hrozenchik
Michael Hulak
Kara Hulak
Paul Hulak
Michael P. Hurley
Patrick Hurley
John J. Hurley, Jr.
John Mahoney
Lisa Martin
Tom McCauley
Joe McDavitt
Michael McDonough
Brian Miller
Jon O'Connor
Bernie O'Donnell
Jim O'Leary
Howard Resnick
Eddy Rogers
"DOC" Savage
Bob Silvey
Barbara Smith
B.Z. Sullivan
Sharon Sweeney
Lori Tornovich
Carolyn Tutein
Paul Walkowski
Tom Walsh

**In Memoriam**
**Charles Stokinger, B.F.D. — Thomas Rose, B.P.D.**

## PARADE INFORMATION

### Staff & Military Division

*(Assembly on West Second Street)*

Boston Fire Department Vehicles
Boston EMS Vehicles
Mounted Detail, Boston Police Department
Mounted Detail, Boston Parks Department
McDonough Post Color Guard
* United States Navy Band-Newport, Rhode Island
Chief Marshal, Eleanor Tobin-Hulak
Chief of Staff, Patrick Dillon
Parade Adjutant, John J. "WACKO" Hurley
Assistant Parade Adjutant, Francis "Chuck" Mayo
Officers of the Day: Frank Guerrieo, Joseph L. Dillon, Wendell G. Penney
South Boston Allied War Veterans Staff

Chief Marshals Family

* Joseph Hill Post, A.L. #156 - *Sponsored by Mayor Raymond L. Flynn*

*United States Army Color Guard*

*United States Marine Color Guard*

*U.S.C. Constitution Color Guard and Pikemen*

*United States Naval Sea Cadets, Boston Division*

*United States Air Force Honor Guard and Color Guard, Hanscom, Mass.*

*102nd Fighter Wing, Air National Guard Color and Honor Guard - Otis Air National Guard Base*

United States Air Force Mini-Jet

Charlestown High School Air Force Jr. R.O.T.C.

United States Coast Guard Color

* United States Coast Guard Band - New London, Connecticut

* Massachusetts Maritime Academy Regimental Band and Honor Guard

Parade Chaplain, Reverend John Culloty

Thomas J. Hudner, USN, Ret. Congressional Medal of Honor

* Troy High School Marching Band, Troy, New York - *Sponsored by Congressman John J. Moakley*

South Boston Ancient Order of Hibernians

* St. Joseph's Bag Pipe Band, County Down, Ireland - *Sponsored by Senator William M. Bulger*

* Colonial Boys of Norwood - *Sponsored by Councillor Jimmy Kelly*

* Boston Police Drum & Bagpipes - *Sponsored by T-CATALYST*

New York Police Department

Cambridge Police Color Guard

South Boston Against Drugs Float - *Sponsored by SOBAD*

Korean War Veterans

* Westbrook Connecticut Fife & Drum Corps - *Sponsored by the Abbey Tavern*

National Park Service Rangers

MIA Flag

## FIRST DIVISION

Boston Fire Department Color Guard
* Boston Fire Department Bagpipers - *Sponsored by MASSPORT*
Firefighters, Dublin, Ireland
South Boston Citizens Association, Bernie O'Donnell, President
Miss South Boston, Miss Ice-O-Rama, Miss J. Ice-O-Rama
* Marshfield High School Band - *Sponsored by Mt. Washington Bank*
All Veterans Units
Hallamore Clydesdale Horses
* Princemen Chorus (FLOAT) - *Sponsored by Budweiser*
Marion Manor's FLOAT
Malden Irish Leprechaun FLOAT
* Acton-Boxborough High School Band - *Sponsored by Representative Paul Gannon*
South Boston Baptist Bible FLOAT
South Boston Youth Sports Teams, Cub Scouts, etc. . .
Suffolk County Sheriff's Department and Vehicles - *Sponsored by Sheriff Robert Rufo*
MBTA Color Guard with McGruff Crime Dog
* Springfield High School Band - *Sponsored by the Castle Island Association*
Richard Iannella - Candidate for City Council
South Boston Neighborhood House & Seniors Trolley
WSSH Radio - MiniVan
CABLEVISION Cartoon Characters
* Woburn High School Band - *Sponsored by PEPSI*
Peggy Davis-Mullen - Candidate for City Council
Boston Public School Nurses
Leukemia Society - Norfolk Sheriffs Dept.
WCGY Radio and Contest Winners

## SECOND DIVISION

* Nashua, New Hampshire Marching Band - *Sponsored by South Boston Savings Bank*
Reading Youth Baton Squad
* Lexington Minutemen - *Sponsored by Schuberts*
* North Attleboro High School Band - *Sponsored by Hub Video*
Salem, New Hampshire Joeys, Clowns
* Attleboro High School Band - *Sponsored by The Blackthorne Pub*
South Boston Yacht Club FLOAT - *125th Anniversary*
Franny D's Music Co. FLOAT - *D.J. Frank Moynihan*
Collins Auto
* Immaculate Heart of Mary Band
Massachusetts Citizens for Life

## THIRD DIVISION

* Whitman-Hanson High School Band
Class Act Baton Group
The Wheelmen Antique Bicycles, Charlton, Massachusetts
Bicycle for Five
* Colonial Band of Lawrence
* 10th Mass. Volunteers (Civil War w/Music)
Curtin Post #8006
9th Mass. Volunteers (Civil War w/Guns)
* Middlesex 4-H Club, Fife & Drums
Colonel Knox Colonial Militia
Nathanial Warner Colonial Militia
Massachusetts Water Pollution
Irish Curragh Rowing Boat FLOAT
* Boston City Marching Band
Cycling Murrays
* Lincoln High School Band, Warwick, Rhode Island

## GENERAL ORDERS

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Uniforms as prescribed by Organization Commanders. Rate of march 120 steps per minute. Liaison Officers and Parade Coordinators are instructed not to permit too wide a gap between organizations: 50 (fifty) yards distance is the maximum.

By order of

OFFICIAL
John J. "Wacko" Hurley
*Parade Adjutant.*

Eleanor Tobin Hulak, *Chief Marshal*

These orders SUBJECT TO CHANGE as conditions warrant.

Special thanks to BNN Access Cable for their cooperation in televising this event.

SAY "NO" TO DRUGS, AND WE ALL PRAY
FOR FAMILY VALUES.

**EXHIBIT B**

CHESTER DARLING
*Attorney and Counsellor at Law*
306 DARTMOUTH STREET
AT COMMONWEALTH AVENUE
BOSTON, MASSACHUSETTS 02116 .

(617) 536-2050

January 14, 1993

VIA TELEFAX AND U.S. MAIL

Mary L. Bonauto, Esquire
GLAD
Park Square Advocates, Inc.
P.O. Box 218
Boston, MA 02112

**Re: 1993 St. Patrick's/Evacuation Day Parade**

Dear Attorney Bonauto:

This letter is in response to your letter of January 12, 1993.

My client will not permit "GLIB" to march in this year's parade.

The vote that was recently taken by my client to not permit any group with any sexual themes to march was merely a formalization of the fact that my client has a traditional parade expressing its religious and social values.

Thank you for your attention to this matter.

Very truly yours,

Chester Darling

CD/cm

A50

UNITED STATES OF AMERICA

**Invisible Empire**
**Knights of The Ku Klux Klan**
INTERNATIONAL OFFICES
Box 700
Gulf, N.C. 27256

IMPERIAL WIZARD
J. W. FARRANDS

**From the desk of**

Kleagle of the Realm of Massachusetts Invisible Empire Knights of the Ku Klux Klan.

January 09, 1993

Mr. Wacko Hurley, et al.
The Organizers of the Private St. Patrick's Event.

Dear Sirs;

Please! I am asking you humbly on behalf of the Invisible Empire to take part in marching in the Parade. We feel that if other groups can be allowed then we should be also. South Boston is the finest community in Massachusetts and it is the most beautiful, especially it's people.

The permission, if you will give it, can be related through the media and the Minuteman Klavern will contact you as well as hear your conditions.

Sincerely and with
my thanks, Kleagle
of Mass.

## GLIB Fact Sheet

1. Why we are marching . . .

- We are marching to celebrate our Irish heritage as openly gay, lesbian, and bisexual individuals.
- We are marching to support our sisters and brothers in ILGO in New York City.
- We are marching to remind people that there are lesbians, gays, and bisexuals within all demographic areas, including people of Irish heritage.

2. Who likes us . . .

ILGO has endorsed GLIB's participation in the St. Patrick's Day Parade.

GLIB sought and received endorsement from the Greater Boston Lesbian and Gay Political Alliance.

3. Why did GLIB sign an agreement with the police?

From the first meeting, GLIB has defined itself as a moderate group; its focus is the celebration of the Irish heritage of the bisexuals, lesbians and gays of Boston. The agreement signed by GLIB, contrary to what the media coverage suggested, was only a restatement of ideas and cooperative measures that GLIB had previously agreed to in meetings with parade officials, mayoral staff, and police. All members of GLIB wholeheartedly approved the items in the agreement. The idea to write down an agreement that could leave no room for misrepresentation was specifically designed to defuse the Allied War Veteran's Council statement that safety issues should prevent us from marching. There is some debate as to whether it was a capitulation that discredits the gay community; we felt that we had much to gain and relatively little to lose by continuing to try to deal with the issue as reasonable people and avoid strongarm tactics (like the lawsuits).

4. Why agree to allow only 25 people to march?

We are bound to a limit of 25 people because this is the number of people we specified on our parade permit application.

Back in February we worried that we wouldn't be able to convince 15 people to march!!

Now, of course, there is substantial interest in the gay community in supporting gays' efforts to march. We are committed to providing approximately 50% of the marching slots to the general gay community. We will hold a meeting on Friday, March 13, at the Gay & Lesbian Community Center, for all people interested in marching, and will hold some type of lottery if many people express interest.

5. Why can't other gays just join in the march to show support?

There are two reasons we want to discourage individuals from attempting to join GLIB marchers: safety issues, and issues relating to the goals of GLIB.

The safety of all participants and observers is the primary concern of GLIB. Our presence in the parade is obviously very provocative for some people, but we have never intended to have an "in your face" -type march. A large, angry, group of gays marching would be very intimidating and likely, in turn, to produce an angry response from the crowd. This is a situation we want to avoid.

In addition, GLIB's goals in participating in the parade are to celebrate the Irish heritage of gays, lesbians, and bisexuals within the context of the parade. We are committed to observing the spirit of the day, which includes observing the focus of the parade, which is to celebrate being Irish, and have a good time. Although there are obviously many political ramifications to our participation, our primary goal is to march under our own banner, not to be a provocative political distraction.

6. What are the safety issues?

We have been working with the police consistently to address safety issues. Police will provide special services for marchers and supporters, including escorting marchers to and from the parade, and marching with GLIB members.

We encourage people who are planning on coming to the parade to:

- Avoid alcohol.
- Be realistic about the parade atmosphere. This is NOT Gay Pride. Wearing drag or other colorful clothing may make you, your friends, and marchers potential targets for bashings.
- Prepare yourself for the possibility that you will encounter a homophobic person who has had too much to drink.
- There is safety in numbers. Come to the parade with friends.

7. What's happening . . .

We are marching! If the council rescinds its rejection, we will march. If the council votes again to exclude us, we will pursue our first amendment rights, go to court, almost certainly we will win an injunction permitting us to march, and we will march.

There are two legal tacks we can take if we need to go to court: the first is to petition for our right under the first amendment to march in a public parade. The second tack is to protect ourselves as gays and lesbians from discrimination in public accommodations under the gay rights legislation.

8. What people can do to help . . .

We have many areas that people can help with: we are having fundraisers at Bobby's all next weekend, we have many activi-

ties to coordinate, we have a need for people to help with security activities. Let us know you're interested!

And, of course, we desperately want and need people to come to the parade to provide moral and VOCAL support! Please come and cheer us on!

A55

**GLIB**
Irish-American
Gay, Lesbian and
Bisexual
Pride Committee
of Boston

GLIB
% O.C.B.C.
1151 MASS AVE.
CAMBRIDGE, MA 02138

HOTLINE: (617) 695-8051

***HISTORY***

GLIB was formed in early January 1992 by a group of Irish-American women with the purpose of creating a social group for gay men, lesbians and bisexuals of Irish descent, representing the broad spectrum of our community. The group selected the Evacuation Day Parade (Boston's St. Patrick's Day Parade) as a starting point. On the original registration we stated there would be 25 marchers and were later held to this number by the judge.

Despite initial cooperation from the Grand Marshal, the group's application to march was rejected by the governing board of the parade, the Allied War Veterans' Council of South Boston. The reason given was that of safety - the board claimed GLIB would not guarantee the "good" behavior of its members and thus would be a safety problem. In response, GLIB filed with the police a written copy of the verbal agreement it had already made to members of the police and the media, thereby alleviating any supposed safety concerns. Nonetheless, the Council decided to stand by its original rejection.

GLIB filed suit against the city and the parade organizers; as a city funded and supported event, it could not discriminate on the basis of sexual orientation. The Civil Liberties Union of Massachusetts, Gay and Lesbian Advocates and Defenders and others argued for us. GLIB had its day in court, we won, and the rest is history. Rather than challenge the verdict with an appeal the parade organizers relented.

On March 15, 1992, GLIB took its place in the Irish-American community in the greater Boston area and was the first Irish-American Gay, Lesbian, and Bisexual group to march in the Boston St. Patrick's Day Parade.

### *GOALS*

Celebrate our Irish heritage as openly gay, lesbian and bisexual individuals.

Remind people that there are lesbians, gay men and bisexuals within all demographic groups, including people of Irish heritage.

Form coalitions with other regional, national, and international gay, lesbian and bisexual organizations such as ILGO.

### *ACTIVITIES*

- Participation in various Pride marches through the Northeast.
- Sponsor fundraisers for gay, lesbian, and bisexual relevant causes here and in Ireland, i.e., AIDS services, women's health issues, etc.
- Social events such as brunches, bowling league.
- Archival research of the 3/15/92 march, including press clippings and video pieces, and creation of a documentary.
- Publishing a regular newsletter.
- Celebrating our cultural heritage.
- Whatever else our clever Celtic imaginations conjure!

### *GROUP AVAILABILITY*

GLIB is open to all gay men, lesbians, and bisexuals of Irish descent and others interested in Irish and Irish-American issues.

***SEND THIS IN FOR***
***MORE INFORMATION***

NAME_____

ADDRESS_____
_____
_____

PHONE #
DISCRETION? yes _____ no _____

I would be interested in:

- Membership Information
- T shirt(s) $12 each
  Size: M___ L___ XL___
- Button(s) $3 each
- Newsletter
- Making a donation
  (make checks payable to GLIB)
- Making an in-kind donation
  (raffle items, services, etc.)
- Establishing a chapter organization

***Thanks to everyone for the past, present and future support of our organization.***

***May you always have the luck of the Irish!***

**GLIB**
**% O.C.B.C.**
**1151 MASS. AVE.**
**CAMBRIDGE, MA 02138**

CITY OF BOSTON
EVACUATION DAY PARADE
SOUTH BOSTON, MASSACHUSETTS
SUNDAY, MARCH 15, 1992
CHIEF MARSHAL — THOMAS J. LYONS
PARADE ADJUTANT — GENE VALLIANCOURT
POST OFFICE BOX 351
SOUTH BOSTON, MA 02127
Telephone: (617) 268-8525 — 269-5017

PARADE REGISTRATION FORM

Name of Unit Irish-American Gay, Lesbian, and Bisexual Group of Boston (G.L.I.B.)

Manager or Official to Whom Correspondence Should Be Sent:

Name: B.S. Kay

Address % The Center, 338 Newbury St., Boston 02116

Telephone: 695-8051 Area Code: 617

We will ✓ Will not Participate

Number of Persons in Unit 25

Type of Unit:

| | |
|---|---|
| Bans | Military Unit |
| Drum & Bugle | Veterans Group |
| Drill Team | Scout Troop |
| Color Guard | Civic Organization |
| Float | Other Social Club |

REMARKS: Dear Ms. Kay,

Your application has been denied for safety reasons and insufficient information regarding social club.

Tom Lyons

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## The Commonwealth of Massachusetts

*By His Excellency*
ALVAN T. FULLER
GOVERNOR

## A PROCLAMATION

A century and a half has been recorded in the history of our Commonwealth and Nation since the British Troops evacuated the city of Boston and Massachusetts. America has grown from a struggling dependency to be the greatest nation on earth, the pride and hope of liberty loving people the world over. To those early settlers and pioneers who, with odds tremendously against them, conceived and founded a Republic which in achievement has surpassed anything in the world's history, we should be forever grateful. To the virile manhood of those days that believed in simplicity and directness, and who forgot self and laid all that they had on the altar of a Nation not yet accomplished, we should devoutly offer our thanks and appreciation, and humbly try to follow in their footsteps. The lesson clearly demonstrated by the patriots of the Revolution — that movements for great reforms need leaders of character and men of action who are willing to build up and not pull down, who recognize that co-operation is necessary for success — is a heritage and inspiration for our country in all the years to come.

That the Commonwealth of Massachusetts and its capital city contributed so much in the struggle for freedom and independence should always be a source to us of gratitude, pride and emulation.

In recognition of the patriotism and sacrifices of the citizens of Massachusetts one hundred and fifty years ago, I recommend that proper observance be made of this important anniversary in

the history of our Commonwealth and Nation by the holding of historic exercises and other patriotic demonstrations, and by a general display of the colors on the anniversary day, March seventeenth of the current year.

GIVEN at the Executive Chamber, in Boston, this ninth day of March in the year of Our Lord, one thousand nine hundred and twenty-six, and of the Independence of the United States of America the one hundred and fiftieth.

ALVAN T. FULLER.

By His Excellency the Governor.

FREDERICK W. COOK,
*Secretary of the Commonwealth*

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**God Save the Commonwealth of Massachusetts**

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## The Commonwealth of Massachusetts

*By His Excellency*
LEVERETT SALTONSTALL
GOVERNOR

## A PROCLAMATION

### 1940

There is one day which we annually commemorate in Massachusetts that has more significance than ever this year when much of the world is torn in a terrific struggle between dictatorship and democracy. That occasion is the anniversary of the expulsion of the British army from Boston on March 17, 1776.

This event was more than a major military victory. It was a milestone in the march of American independence, for it marked the departure of imperialism from these shores. Growing with the years, the significance of the observance is today dramatic in the extreme, for we find the nation whose retreat in 1776 we have always celebrated now in the vanguard of the defense of liberty against oppression and tyranny.

Freedom knows no boundaries and is not cast in a mould which history can imprison in any land. It belongs to every nation and, sooner or later, we hope and pray, liberty will be a common heritage throughout the world.

In celebrating this anniversary, let us be mindful of the debt we owe to George Washington and his courageous men for the important part they played on Dorchester Heights one hundred and sixty-four years ago. By banishing imperialism and establishing democracy, they have already given to many generations the priceless gift of life, liberty, and happiness, which is still beyond the reach of countless thousands throughout the world.

It is interesting to note that "St. Patrick" was the password used by our troops. Ever since, the celebration of the double anniversary has been one of Boston's most cherished holidays.

Therefore, in accordance with the provision of the law enacted by the General Court of the Commonwealth of Massachusetts, I, Leverett Saltonstall, Governor of the Commonwealth of Massachusetts, do hereby designate and set apart as

**Evacuation Day**

Sunday, March 17, 1940

and direct that the flag be raised on all public buildings on the preceding day, and that suitable observance of the occasion be made in the homes, schools and churches of the Commonwealth.

GIVEN at the Executive Chamber in Boston, this fourth day of March, in the year of Our Lord one thousand nine hundred and forty, and of the Independence of the United States of America, the one hundred and sixty-fourth.

LEVERETT SALTONSTALL

By His Excellency the Governor,
FREDERIC W. COOK,
*Secretary of the Commonwealth.*

**God Save The Commonwealth of Massachusetts**

A65

**The Commonwealth of Massachusetts**

By His Excellency
WILLIAM F. WELD
Governor
A PROCLAMATION
1991

WHEREAS: Upon George Washington's arrival in Cambridge on July 2, 1775 he found himself surrounded by the hastily collected militia of the New England Colonies; and

WHEREAS: After many days of preparation and patient waiting, General Washington was ready to strike. Upon receiving the cannon and field pieces brought by Colonel Knox from Fort Ticonderoga, by his bold and sudden move, he was able to seize Dorchester Heights and bring about the evacuation of the British forces; and

WHEREAS: With negotiations terminated on March 8 and the first great victory of the Revolution completed, General Howe and his troops were given safe evacuation in return for the assurance that the town would not be burned; and

WHEREAS: Evacuation Day, March 17, 1776, saw eight thousand troops and nine hundred Tories set sail for Halifax, marking the last garrisoning of British troops in Massachusetts, where the war had begun. Massachusetts men fought long and hard for seven more years in other provinces but never again in their home state, for Massachusetts was now liberated;

NOW, THEREFORE, I, WILLIAM F. WELD, Governor of the Commonwealth of Massachusetts, in accordance with Chapter 80 of the Acts of 1938, do hereby proclaim March 17th, 1991 as

EVACUATION DAY

and urge the citizens of the Commonwealth to give appropriate recognition ot the observance of the 213th Anniversary of a memorable day in Bay State History.

Given at the Executive Chamber in Boston, this fourteenth day of February, one thousand nine hundred and ninety-one and of the Independence of the United States of America, the two hundred and sixteenth.

William F. Weld

MICHAEL JOSEPH CONNOLLY
Secretary of the Commonwealth

GOD SAVE THE COMMONWEALTH OF MASSACHUSETTS

GLOBE STAFF PHOTO / BILL GREENE

**MIXED GREETING** – *Gay marchers were met with obscenities but also drew cheers yesterday in their second court-backed appearance in South Boston's St. Patrick's Day Parade. Snow had postponed the event for two weeks.* *Page 13.*

BOSTON GLOBE 3/29/93

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# TRANSCRIPT OF PROCEEDINGS

In the Superior Court of Suffolk County,
the Commonwealth of Massachusetts

Irish-American Gay, Lesbian & Bisexual Group of Boston

*v.* C.A. 92-1518A

City of Boston, South Boston Allied War Veterans Council
and John J. "Wacko" Hurley.

Be it Remembered that in November, 1993 before the Honorable J. Harold Flannery, Superior Court Judge, at Boston, Massachusetts, the following proceedings were had in the above styled and numbered cause:

Appearances:

Philip A. Cronin, for the Plaintiff.

Chester Darling, for the Defendant, South Boston Allied War Veterans Council.

Claudia Billings McKelway, for the Defendant, City of Boston.

Proceedings

* * *

## STATEMENTS TO THE COURT BY ATTORNEY CHESTER DARLING ON THE MOTION IN LIMINE

[4] THE COURT: As I understand your position, it is, in part, that with particular reference to the public accomodations statute, so-called, the parade is not a public event.

MR. DARLING: No, it is a public event, Yoûr Honor.

THE COURT: It is a public event?

MR. DARLING: Oh, sure, it is.

THE COURT: Subject to the statute?

MR. DARLING: Absolutely not. A parade is not defined in the statute in 92A as a public accomodation. There are no First Amendment expressions listed or enumerated in 92A as far as public accomodations are concerned.

THE COURT: I see. So the language about public recreation, public highway and so on, how do you —

MR. DARLING: I'm comfortable with those, Your Honor, inasmuch as commerce occurs on the public highways. I mean, people have pushcarts. There are any number of enterprises that take place adjacent to the sidewalks and on the highways, but —

[5] THE COURT: This, you say, is a public spectacle and it's a form of recreation for the spectators, I gather.

MR. DARLING: That is one of the elements.

THE COURT: And it takes place on a public highway.

MR. DARLING: Absolutely.

THE COURT: And yet the statute doesn't apply?

MR. DARLING: No, Your Honor, because it, the thrust of the statute, and if one reads the beginning of the statute, I mean, if we apply all of the usual doctrines of ejusdem generis, or just the plain words of the statute, they relate to commerce that takes place and public accomodations in the form of restaurants and they try to be as broad, and there are cases that say they are inclusive and it should be interpreted broadly, but

the fact that the public highway, public streets are enumerated, doesn't have any application to this case. 92A has no application in this case because the streets of South Boston were permitted to my clients for a time certain. The public was excluded from the street for a time certain, so it is a public event. It is a civic celebration, of course, but it's many [6] other things and what my clients determine goes down the streets of South Boston consistent with their permit is the speech that appears on the streets, and it is theirs, the speech, the expressions are all embodied —

THE COURT: That's helpful. I thought it was your position that the statute may well apply but cannot be constitutionally applied to your clients. I take it your fall-back position is that, because of your right of expressive association, if the statute were applicable to the event, it could not constitutionally be applied to your client.

MR. DARLING: Respectfully, I don't see the fall-back position yet. I misunderstood the Court. What my position is —

THE COURT: If I should disagree with you and hold that the statute applies to the event, you still have a right to exclude the plaintiffs based on your constitutional First Amendment expressive association argument. That's why I called it a fall-back position.

MR. DARLING: Yes, but I respectfully don't think — I'm not suggesting how the Court is going to decide the case but the facts won't support proposition one. They can't.

[7] THE COURT: What's proposition one?

MR. DARLING: That a parade is a public accomodation.

THE COURT: Well, see, that's the whole point.

MR. DARLING: Exactly, Your Honor.

THE COURT: That's the whole point of the factual inquiry.

MR. DARLING: The motion in limine before the Court this morning does have some relation to —

THE COURT: We will get to that in a second, sir. I must ask you to stay with me. It is a public event but not of the genre, not of the type contemplated by the Public Accomodations Act. Is that your position?

MR. DARLING: That's correct, Your Honor, yes.

THE COURT: Okay. And your additional position is that, regardless of the statutory questions, you have a constitutional right to be free from participation by the plaintiffs?

MR. DARLING: Yes, Your Honor. We have an absolute right on the basis of the First Amendment, Article One and Article Sixteen and so forth.

THE COURT: And that is what? Noncommercial, [8] ideological speech, or what is the right that you are asserting, your Constitutional right? It's the right of expressive association. You have used that term which does appear in some of the cases.

MR. DARLING: It does but it doesn't satisfy the description I would apply to the event, Your Honor. In many ways, it is a unique event. St. Patrick's Day, for some peculiar reason, was declared a Suffolk County holiday during Mayor, I believe during Mayor Curley's administration. It just so happend that Evacuation Day was declared the holiday because it fell on March 17. The celebration that occurs, and it's been frequently referred to as a celebration, the First Amendment activity of my client is a celebration. It has many components and, during the trial this Court will hear a lot of evidence relating to the various components of the speech. I have no equivocation as far as putting my witnesses on and detailing what the speech of my clients is. My objection, of course, is that my clients explain this speech. They will describe the speeches for the purpose of this trial, but my basic legal position is that they don't have to. They simply don't have to.

Any permitted activity, for instance, I [9] have tried to make a comparison between, that I thought was appropriate, between

my clients' parade and the Gay Pride parade and the Gay Pride parade, there is a message that's defined by the parade committee that's suitable for their celebration and parade and expressions and there are a variety of them. Well, my clients have their own values and expressions and messages they wish to convey and it is a permitted exercise. My clients determine who marches, whom the sponsors are. My clients determine the messages contained in each group.

THE COURT: Let me interrupt you, sir. When you say that your clients have the right to express their — or make their expressions without the participation of the plaintiffs, is it expressions of a religious nature that you have in mind? I don't ask you to restate them now. The witnesses will, if as you say, they will describe their expressions or is it of an ethnic pride nature? Is it of a secular celebratory nature? How would you label the expressions that are being protected?

MR. DARLING: If we are having openings, Judge, mine is about over.

THE COURT: Well, I'm sorry to duplicate it but I really want to rule on the motions in limine [10] on an informed basis.

MR. DARLING: Your Honor, the methods of expression are several in the parade. I don't have the transcript from the two hours, I think it was two hours and a half description of the parade and what the messages were from February of this year, but let me just review quickly what they are.

First of all, there is a religious component to the parade. There are groups that are very devout people.

THE COURT: You needn't advance subsidiary findings. Telling me it has a religious dimension is responsive to my question.

MR. DARLING: And a political one, a cultural one, an ethnic one, a neighborhood one. I didn't even know what Southie pride was until I got involved in the enterprise. Now is it a palpable, real thing that hopefully will enter this court-

room so that would be another component of the parade. The inclusiveness of my clients will be reflected in their parade. It's been characterized as being eclectic. Of course it is. There's entertainment in the parade which, of course, is protected activity. There is a fairly recent case where a Miss Gay America Pageant, the homosexual activity and expression is [11] protected, First Amendment protected activity as are traditional values.

THE COURT: Nobody seeks to suppress your expressions. You seek to have your expressions without the burden of these would-be participants.

MR. DARLING: Oh, no, Your Honor. No, no. I would not characterize it that way. I would characterize it as follows: my clients resist, and will resist for a long time, as long as they can, having a court or the MCAD or the City of Boston tell them how to speak and that's how it translates, simply.

THE COURT: That's what I say. Nobody is telling you you may not manifest this ethnic, neighborhood, political, religious parade. You are going to do that presumably with or without the plaintiffs, but you seek to do it without the plaintiffs or you seek —

MR. DARLING: Yes, Your Honor.

THE COURT: Or you seek to maintain your right to do it without these interlopers.

MR. DARLING: Not interlopers, Your Honor, inasmuch as the facts will show that my clients were inclusive initially in this whole operation and I am so pleased that we finally have the opportunity [12] to get all of the facts before the Court.

Initially, an approach was made to the chief marshall, Mr. Thomas Lyons, in 1992. His response —

THE COURT: Before you get into an opening and it does sound more like an opening, I just needed to know what the elements or the components are of the Constitutional right of expression that you are asserting, and you tell me they are neighborhood, ethnic, religious, political —

MR. DARLING: Patriotic.

THE COURT: Patriotic.

MR. DARLING: For instance —

THE COURT: No, no. I don't need a for instance because we will be at this for a time and that's responsive to my question, so those are the or those are some or all of the —

MR. DARLING: Some.

THE COURT: Some. Well, are there others that come to mind?

MR. DARLING: Well, it's difficult to describe the responses that are generated in people when particular kinds of music are played. The bands play a variety of different pieces.

THE COURT: So it's artistic, artistic [13] or cultural.

MR. DARLING: And patriotic.

THE COURT: Yes, you said that.

MR. DARLING: Okay. The messages contained are multiple. For instance, the program itself —

THE COURT: Well, now, wait a minute. I just need to know, sir, that my appraisal or my evaluation of these values that you seek to maintain is part of your Constitutional position in this case.

MR. DARLING: Yes.

THE COURT: Okay. Alright. Now, did you want to speak to this morning's motion in limine and then I will hear from the plaintiffs.

MR. DARLING: Yes. Yes, Your Honor. The motion is to exclude the viewing of the videotape of 1993. We are into Monday morning —

THE COURT: The video of what, sir?

MR. DARLING: Of the parade in 1993, Your Honor. It's redundant. We have exhibits here. For instance, they have not been entered yet, Your Honor, but one of the exhibits, I don't know the number, will be the roster and the roster contains, adjacent to the names of the bands, sponsors that appear

in the parade. The Court now has all of the financial information that was produced by the Veterans.

[14] THE COURT: Okay. Apart from redundancy or cumulativeness, do you have objections?

MR. DARLING: Yes, time. Time, Your Honor. I am hopeful that, you know, I hope we can conclude the case in one week and I don't know how long it's going to take to play that tape.

THE COURT: I see. Well, alright. Why is time so important to you? I appreciate that from an institutional standpoint but there must be something more than your solicitude about the Court.

MR. DARLING: There was a confusion about the witnesses that would be called. When I called Friday, that was the first time I discovered that the tape was going to be played. It was never listed as a prospective exhibit and I have no real objection to it. I just hope that it doesn't cut down the trial. At the same time, if that is to support any testimony relating to the contributors to the parade, individual and corporate contributors, and supporters of my clients' speech, then, if course, I renew the argument, without burdening the Court this morning, from last Wednesday, but the privacy, we're talking about a First Amendment exercise, Your Honor, not a commercial activity, and if these people want to put their names on a banner supported by or sponsored [15] by, that's their prerogative and no Court and no agency, city, state, can sit down or compel anyone that's going to join in a speech or associate in a speech with somebody else, engaged in a First Amendment activity and compel them to produce their checks, why did you support the First Amendment activity? This is beyond, beyond credulity as far as an application of the First Amendment is concerned.

* * *

[30] MR. DARLING: Your Honor, the evidence will be quite contrary to the position of the plaintiffs, that [31] my clients intend no injury to the plaintiffs —

THE COURT: Well, now, wait. You will have to help me. That confuses me, because was it your position that your clients were and continued to be inclusive but this specific group is unwelcome for some reason?

MR. DARLING: Well, they are now, Judge. They are now.

THE COURT: I'm sorry?

MR. DARLING: They are now after what they —

THE COURT: GLIB is unwelcome?

MR. DARLING: GLIB is unwelcome, is not welcome any more.

THE COURT: Because of its connection with ILGO or for whatever reason, the genesis of the controversy, what I'm trying to get to, is some other group with the same sexual orientation, does it continue to be welcome? You say it started out to be inclusive.

MR. DARLING: In what form?

THE COURT: As participants in the parade.

MR. DARLING: Gays and lesbians, bisexuals, have participated in the St. Patrick's Day for many, many years. It is not a litmus test to be heterosexual [32] to march in the parade.

THE COURT: That's what I'm trying to get at. What is it, as precisely as you can articulate it, what form of participation, if any, is objectionable. I take it GLIB, this specific organization or association, its sponsorship is, continues to be unwelcome.

MR. DARLING: Well, that particular group. Let me say this, Your Honor, the Council, they are the Veterans Council, they are the elected members from the various groups, Veterans of Foreign Wars, and Disabled Veterans and American Legion Posts in South Boston. They determine who the sponsors are and who the participants are, and they had a vote. Let's see, they had a vote for the people at this year's parade and their vote was that they would not permit any sexual themes, any

group to have any sexual themes. That was their wish. They memorialized it.

THE COURT: And any group that announces its orientation is a sexual theme?

MR. DARLING: Your Honor?

THE COURT: I said, any identifiable group in the parade that announces its sexual orientation is the sexual theme that's excluded?

[33] MR. DARLING: I think that would be fair to say.

THE COURT: Okay.

MR. DARLING: Sexual theme, it would fall within that. Their themes, you will hear, you will see —

THE COURT: Okay.

MR. DARLING: — on the videotape.

THE COURT: So it is not just GLIB. It is any person or group of that orientation who seeks to announce it?

MR. DARLING: Well, I can't say that for the Council but, Your Honor —

THE COURT: You are their lawyer.

MR. DARLING: When you hear the evidence, when you heard the evidence and you see how the process started, the inclusive process started, and why it went sour, you will see that, perhaps, if they had used a little different approach, maybe if their, if a group marched with Mr. Scondras who never asked to be invited, they wouldn't have been excluded. Mr. Scondras has never been excluded from the parade. No one has because of their sexual preference. If they had gone about it a little differently, a group may have marched without the sexual theme being [34] identified, fine. Maybe the Council would have said, okay. I think we now have a history that would preclude that. That's my personal observation. I can't speak for the Council but initially, they were inclusive. They have voted no group, any group with any sexual theme is not to be permitted in the parade, that's it. So, that's the current

position of the Council, not mine, and finally, Your Honor, there are two things. One is uncontroverted. There is a whole licensing procedure for parades in this case. There are many, many cases alluded to and I provided the Court with quite a few. I used Reverend Fred Shuttleworth as the main point because his case was so unique in the sense, at least to me, because I was down in Alabama at that time, but all of the licensing cases preclude anyone from determining the content of the parade, that's it, uncontroverted from the other side. This is the obstacle that they are trying to get by.

The fact is, the City of Boston is unable to determine the content. They tried. They tried in '92 and '93, but — and that will evolve in the evidence, but they failed. The City can't instruct anyone to march in a First Amendment or participate in a First Amendment activity. MCAD has checked [35] in now and they have issued a cease and desist order, of all the gall, Your Honor, to have an agency act and acknowledge that this is a case of first impression and a novel case, but, of course, it is. They have no jurisdiction over the constitution and there will be evidence that Mr. Duffy, in 1992, prior to Ms. Kay talking to any counsel, was soliciting a complaint, not in '93, '92, before any of this activity started.

* * *

[226] SUPERINTENDENT THOMAS P. MALONEY, having been called as a witness on behalf of the Plaintiff, being first duly sworn, was examined on his oath as follows:

* * *

CROSS-EXAMINATION
By Mr. Darling:

* * *

[234] Q. And if there is someone in a — let's confine ourselves to the 1992 parade, Superintendent. If a group jumped into the line of march, that was not listed on the roster, and was observed by yourself or your colleagues, what next would happen?

A. We probably would have consulted with the parade organizers to find out if they approved or concurred with this entrance of this other group into the parade. If they did not, we would try to eject them from the parade route.

Q. In 1992, I can't recall, Superintendent, will you help me out? In either the 1992 parade or the 1993 parade, were you called by Mr. Hurley on the radio regarding a pickup truck that was down at the Andrews Square Assembly area?

A. Yes, yes, I was.

Q. Was that the 1992 or '93 parade? Do you remember?

A. I think it was '92. I'm not sure.

Q. Okay. As a result of receiving the radio call from Mr. Hurley, what did you next do?

[235] A. I went to the scene and there was a truck there with placards on it that was anti-gay, if you will, that could have been inciteful if it had been allowed to be in the parade. We ordered it out of the line of march or out of the procession, if you will.

Q. Did Mr. Hurley request that you remove that truck?

A. Yes, he did.

* * *

[242] THOMAS J. LYONS, having been called as a witness on behalf of the Plaintiff, being first duly sworn, was examined on his oath as follows:

* * *

DIRECT EXAMINATION
By Mr. Cronin:

* * *

[246] Q. In the process of selecting parade applicants for 1991, or anytime in 1992 prior to March of 1992, did you have any written standards or criteria as to the selection of parade participants?

A. What I used were the copies of previous parade applications because on it it had the addresses and the contact person of that band or unit and, I think, in my case the chief marshall has the ability to somewhat decide what he would like to do with his parade. In my case, I wanted it to be a salute to the men and women of the armed services so that we had more military participation. So that was a different avenue to take. But, by and large, I would say that 95% of the '92 parade was done through the previous parade applications.

* * *

CROSS-EXAMINATION
By Mr. Darling:

* * *

[262] Q. Eventually some publicity occurred regarding the controversy that was emerging between the group and [263] marching and so forth. Is that correct?

A. The controversy started after March 1st, when the vote was taken and, I believe some of the local papers had a headline that a gay group had been denied access to the Evacuation Day Parade.

Q. As the result of that did the veterans receive a communication from the Klu Klux Klan?

A. Yes, Sir. I received a letter at my home.

Q. Would you identify this document please?

A. Yes, this was the letter that was pushed under my door.

Q. Did you make it known that the KKK wanted to march in the 1992 parade?

A. Yes.

Q. Of the veterans. I'm sorry.

A. Yes. After receiving this, it was prior to our parade but I had contacted Mr. Hurley and a number of the people involved, Mr. Vaillancourt, and I showed them what this was deteriorating to and that, you know, this is not going to happen.

Q. And the veterans were not inclusive as far as the KKK was concerned and this letter being treated as any kind of a request to participate. Is that correct?

A. Yes.

Q. As far as the annual parade itself was concerned would [264] you define it as a family event?

A. That's what we had hoped for. Yes.

Q. A traditional parade?

A. Yes, Sir.

Q. With religious components in the parade?

A. Yes, Sir.

Q. Political speech in the parade? Politicians?

A. Yes, Sir.

Q. A lot of inspirational music?

A. Yes, Sir.

Q. I don't know if I asked you before but because of your background and the time one of the major themes of the 1992 parade was a salute to the troops from Desert Storm. Is that correct?

A. Yes, Sir.

Q. Was it in 1992 that there was a missing in action float?

A. Yes, Sir.

Q. In 1993 there was a missing in action blanket that was marched through the streets. Do you remember that?

A. Yes, Sir.

Q. In the 1992 float were there men dressed as prisoners in a cage drawn by a truck?

A. Yes, Sir.

Q. Do you recall if there was a 4H group in the 1992 parade?

[265] A. I know they were on the roster.

Q. Do you know if the little league groups and boy scouts and girl scouts participated in the 1992 parade?

A. Yes, Sir. They were on the roster also.

Q. A number of celebrities were invited to the parade?

A. Yes, Sir. I think we had the bronze medal winner from the Olympics, Nancy Kerrigan.

Q. Does the parade, as an entity, celebrate what is called "Southie Pride"?

A. Yes, Sir.

Q. Is part of that the fact that a great deal of service men died for their country that came from South Boston?

A. Yes, Sir.

Q. Congressional Medal of Honor Chief Marshalls in the parade?

A. Yes, Sir.

Q. Do you remember the Immaculate Heart of Mary Band that was in the parade in 1992?

A. Yes, Sir.

Q. The participation of the Ancient Order of Hibernians?

A. Yes, Sir.

Q. And the entire parade?

A. Yes, Sir.

Q. Do you recall — Excuse me, I misspoke earlier. Do you [266] recall that the Immaculate Heart of Mary Band reported that they were unable to march in the parade as the result of the participation by GLIB in the parade?

A. They withdrew because of the controversy that was going on.

* * *

[268] Q. Subsequent to the decision of the Court and the parade in 1992, the veterans were presented with a bill from counsel for $43,000.00. You're familiar with that?

A. Yes, Sir.

Q. How did that impact the membership of the Allied War Veterans Council that that bill had been presented as the result of that litigation?

A. It was devastating. Veterans organizations traditionally don't have money to be able to pay attorney's fees. That's for sure. We were looking at, you know, what we'd have to do to raise that kind of money.

Q. Attorney's fees being for the other side in this case; the Civil Liberties Union and a number of private law firms is that correct?

A. Yes, Sir.

Q. And the Gay-Lesbian Advocates Independence; they presented the bill?

A. Yes, Sir.

[269] Q. This year the veterans have been fined a total of $4,500.00 by the MCAD. Is that correct?

A. That's what I read in the paper. Yes.

Q. As a result of reading that in the paper have you had any discussions with your colleagues in the veterans groups and those that organized the South Boston Parade, has that impacted on the preparation for the 1994 parade?

A. I have not attended any meetings since my —

Q. In the general community.

A. — since my parade involvement. But, in general, yes. Any time you look at having to give money, whatever the size is. Again, I mean Aliied Counsel and veterans organizations don't have that kind of money on hand just to be able to distribute. So yes, it has an adverse effect.

* * *

[274] RECROSS-EXAMINATION

By Mr. Darling:

Q. You just responded to questions from Mr. Cronin regarding groups having a particular sexual orientation. As far as the veterans are concerned, was there a vote taken by the South Boston Allied War Veterans Counsel that stated that any group with any sexual theme would be excluded from any parades that they are permitted to conduct?

A. Yes, Sir.

* * *

[295] JOHN J. HURLEY, having been called as a witness on behalf of GLIB, being first duly sworn, was examined on his oath as follows:

DIRECT EXAMINATION
(By Mr. Cronin)

* * *

[323] Q. Did the Council take a vote?

A. The Council took a vote but they don't go on recommendations. They go on, the majority rules. All in favor "aye," and all opposed, "nay." If the "ayes" have it, you're out.

Q. The vote was against it?

A. Unanimously, Sir.

Q. Now, until the application by GLIB in 1992, do I understand that no other organization up to that point had been the subject of a vote as to admission or exclusion by the council?

A. Did you say "no other organization"?

Q. Right.

A. That's not correct, Sir.

Q. What other organization had been?

A. An organization named Restore Our Alienated Rights. It was an anti-bussing group from South Boston, Charlestown, Winchester; all over, but predominatly South Boston [324] and they applied for permission to come into the parade.

We voted not to let them come into the parade. We voted not to let them come in because they had a message that was contrary to our beliefs and our traditional values.

Q. That was when?

A. That was during the height of forced bussing. That might have been around '72 or '73.

Q. So other than ROAR, had any other organizations been subject to a vote like that?

A. Yes, Sir. The KKK wanted to come in.

Q. When was that?

A. That's when the guy, he was the grand wizard, his name was Duke. He personally signed that. But we knew what he stood for and we turned him down on the same basis.

Q. When would that be?

A. It would be around '72 or '73.

Q. Other than ROAR and the KKK do I understand that there was no other organization that had been subject of a vote ny the counsel as to their acceptance or rejection?

A. Not to the best of my memory.

Q. With respect to the application by GLIB, however, and the meeting with the mayor at Phillip's Restaurant, was there discussion, do you recall, about GLIB's status under [325] Massachusetts law with respect to being an organization involved in sexual orientation?

A. We had no conversation on that, Sir.

Q. but you recall, do you not, a letter from Mr. Good, to you, pointing out to you the anti-discrimination laws of the commonwealth?

A. That was his conclusion. I just turned that letter over.

Q. But, based on Mr. Good's letter, did you recognize that you were meeting with the mayor in connection with the vote. That, with GLIB, you were dealing with an organization quite different than the KKK or ROAR?

A. I don't thing they're any — They are probably different in statute in some way but I don't think they're very different.

Q. So, you regarded, as I understand it, GLIB as on the same footing; the same type of organization as ROAR or the KKK?

A. I didn't say that, Sir.

Q. Well how did you —

A. I'm saying that they were denied entrance in the parade strictly because they were not going with our traditional values

and they were sending out a message that we felt we did not want our families to see.

* * *

COLLOQUY WITH THE COURT

[335] THE COURT: Well the record so shows, Mr. Darling. I must say, once again, that I don't fully grasp your position. The other day you said that a parade is not a place of public accomodation, but that is unquestionably a public event.

Now, we have the supporters of a public event and you say their support must not be disclosed?

MR. DARLING: Your Honor, I'm not suggesting that the rights of my clients disappear because I say a parade is a public event. Of course it's a public event. It's also a civic event. But it is also, most importantly, a privately permitted first amendment expression.

I didn't waive my first amendment claim because I characterized a public event as a public event, which a parade is. But it is still a permitted private expression of my client's expression; all those I enumerated.

[336] So, I'm not withdrawing that. I give my heated response, Your Honor, that I had no intention of suggesting that my client's first amendment rights were waived by my characterizing a parade as a public event, which it is.

* * *

FURTHER DIRECT EXAMINATION OF MR. HURLEY

[351] Q. I gather that the Gillette Company was a sponsor?

A. That's not correct. We received no money from Gillette, [352] Sir.

Q. Did you observe, on the videotape, any sign or banner with the Gillette Company name on it?

A. Yes, Sir.

Q. That was in connection with what?

A. That was in connection with SOBAD, South Boston Against Drugs, which does a marvelous job of trying to keep the kids out of drugs and Gillette is their guardian angel, so to speak. They help out them financially.

Q. So that organization, as it proceeded through, had a banner with the Gillette name on it?

A. Yes, that was a very small banner. I actually didn't see it but I know that the shamrocks on it do have the symbol of Gillette because they are financially good to them.

* * *

FURTHER DIRECT EXAMINATION OF JOHN J. HURLEY
(By Mr. Cronin)

* * *

[370] Q. In particular I'd like to refer you to page 137 of that deposition. This relates to the admission of GLIB to the 1993 parade.

"QUESTION: If you yourself were satisfied that this, meaning GLIB, is an Irish-American group interested only [371] in tolerance and non-discrimination, not affiliated with any radical groups, willing to pay their own way and defray costs and that there is no sexual theme involved in their participation, would you recommend to the council that they be allowed to participate?

ANSWER: Yes, I would."

Do you recall that testimony?

A. I do.

* * *

[375] CROSS-EXAMINATION OF JOHN J. HURLEY
(By Mr. Darling)

* * *

Q. And from time to time someone will jump into the line when they shouldn't?

A. Absolutely.

Q. And from time to time, without a vote by the council. Is that correct?

A. Yes there was one there —

Q. Well we heard about the Bruins being placed in the line of march?

A. Right.

Q. Now, when you're confronted with a situation like that, unless it's a PLO organization, in order to remove them from

the parade you are confronted with a real public safety problem if you want to remove — What kind of a judgement do you make when you see someone come into the parade who shouldn't be there?

A. I try to make it from my heart and my head and if there [376] is someone in there and I don't want them there, rather than get into a confrontation with them it would have to be a massive one because everyone gets excited. I'd say, "Okay, you get in there." I'd make sure they were hemmed in by three or four vehicles front and back with no music and all they are going to get out of it is a blister on their feet at the end of the day. They ain't going to get no recognition.

Q. The fact is when people jump into the parade, logistically it's impossible for the veterans to act on the spot. Isn't it?

A. That's correct.

Q. And from year to year this sometimes happens.

A. I would think probably every year.

Q. Okay. But I'm not sure if it was '93 or '92, someone showed up with a pickup truck with "Kill a Fag" sign on the back of the pickup. Is that correct?

A. That's right.

Q. And you spotted it down by Andrews Square?

A. I got a message on my radio that I had on my person to look over my shoulder. I couldn't see nothing. They explained it was in back of the police horses and I crossed the street and I observed this vehicle.

Q. You called Superintendent Maloney?

[377] A. Yes.

Q. And he was removed?

A. Yes, Sir.

Q. He didn't even stop?

A. He came over to me. He has known me over the years. He tried to prevail upon me to make an exception, that this was a nice guy, leave him in.

This was a fellow that was a lieutenant in the fire department.

Q. Mr. Hurley, he was kicked out, wasn't he?

A. He was kicked out. But he had the wrong message.

Q. As far as messages are concerned, there was discussion also about the inclusion and exclusion of certain groups. My question is you excluded — that is the Council declined to have the KKK march in 1992. Is that correct?

A. The Council did so.

MR. DARLING: May I approach?

THE COURT: Yes.

Q. In 1993, did you receive this communication?

A. Yes, Sir.

Q. Can you identify that Exhibit 53?

A. It's a letter from the Klu Klux Klan with an address in North Carolina humbly asking to take part in marching [378] in the parade.

Q. What was the response of the Council to that inquiry?

A. The Council voted unanimously not to allow them in and not to even acknowledge the letter at all.

Q. Thank you. Initially, did you include or exclude the Right to Life group?

A. Initially we included them.

Q. Will you tell us why?

A. When they came into the parade or wanted to come in we had to discuss that they would be walking in an orderly fashion and they said, "Well, we're going to shout the message out there." We said, no.

Q. Who said, no?

A. The Allied Council.

Q. Eventually, they did march.

A. It took several years.

Q. Under what conditions?

A. The conditions of the South Boston Allied War Veterans Council that they march in an orderly fashion and they march without shouting.

You are limited to only one sign. We've had no problems since.

Q. As far as the radical Irish groups were concerned, was there a time when you wouldn't let Noraid or anyone else [379] march that came to the parade with ski masks on and cartridge belts and so forth? Is that correct?

A. They were seen in other parades in that attire and we would not — it was not acceptable to us.

Q. Well, eventually, from the earlier testimony, you have let Northern Irish flags be displayed in the parade, Noraid flags?

A. A Noraid banner and an Irish and American flag, yes.

Q. But without the mask?

A. Without the mask or any of those arms or whatever.

Q. When the Veterans Council is presented with a new group you don't know whether they vote individually in that Veterans Council, to exclude or include, on the basis of social, religious, sexual or any other reason do you?

A. I have no way of knowing that.

Q. Everyone has one vote?

A. We're all individuals. We have one vote.

Q. And the majority of that covers as to whether the exclusion or exclusion of a sponsor of a participant. Is that correct?

A. That's correct. And if we think the vote is close, instead of just having the ayes and nays, we have everybody that voted aye stand up and the nays stand up and do the same thing.

[380] Q. But the fact is, would you agree, with Mr. Lyons when he testified that about 90% to 95% of the participants in the parade have marched before?

A. Yes, that's true.

Q. And they have had prior approval from the Veterans?

A. Yes, you don't have to go back every year for one group that has been accepted.

Q. So, from time to time, getting close to the parade, registration forms are presented sometimes in groups to the Council for their approval or disapproval?

A. That's correct.

Q. And a vote is taken?

A. Yes, Sir.

Q. How much did the financing of the 1993 parade cost; to the best of your recollection?

A. I don't have the books in front of me. I'd say about $35,000.00.

Q. in 1993?

A. Yes, Sir.

Q. And there was no contribution or assistance from the city in 1993?

A. No, Sir.

Q. How did you raise the money?

A. Going door to door to the various store, the merchants. [381] Putting a news item into the local paper pleading for money. We ran a South Boston reunion. We ran raffles. It was nothing to go down the street and have somebody just out and out stop you and give you $5.00, $10.00, or $25.00, or so, without ever wanting any acknowledgment at all; just wanting to be a part of it because of the Southie Pride.

Some people give you money and request that their name not be used. That happens more often than not.

Q. Does that happen more frequently in the last couple of years?

A. I'd say — I don't know. I really couldn't answer that. I'd say probably, yes. But we didn't need the kind of money a couple of years ago that we have now.

Q. But there are people who simply want to make an anonymous donation to the parade?

A. They want to be a part of it. Yes.

Q. And if the city puts some strings on that $8,500.00 each year, if you had to do certain things for the city in order to receive that money what would the response of the veterans have been.

A. Let them keep it. We wouldn't have accepted it.

Q. Isn't that what happened in '93, for their $8,500.00?

A. I don't know whether there were any strings attached. It [382] has been alleged that the City of Boston runs the parade but the City of Boston couldn't run a parade in a telephone booth with $8,500.00.

I mean it takes an awful lot more money than that.

Q. The fact is, Mr. Hurley, that the City of Boston did want to place the GLIB group into the 1992 parade. Is that correct?

A. In 1992?

Q. Yes.

A. Yes, Sir.

Q. And Mayor Flynn made that perfectly clear to you, didn't he?

A. Very, very clear.

Q. Mr. Meunier did too. Didn't he?

A. Yes.

Q. Who is Mr. Meunier?

A. He is a liason for the gay-lesbian group to city hall.

Q. Did you meet Mr. Johnson?

A. No. I don't believe I know Mr. Johnson.

Q. Who has the ability to cancel a parade in inclement weather or for any other reason?

A. The South Boston Allied War Veterans Council.

Q. Who has the ability to determine who can and who cannot march in that parade?

[383] A. South Boston Allied War Veterans Council.

Q. Would you tell us about SO BAD, Mr. Hurley?

A. SO BAD, is South Boston Against Drugs. They are a little run-off of BAD, which is Boston Against Drugs, who assigned a corporate company to be their godfather, more or less, you know, for financial reasons.

They were assigned Gillette and Gillette helps the South Boston group. Some other company would have the Roxbury

group or the Roslindale group or whatever. It's very successful. It's done a marvelous job for the youngsters.

I've been a member of it for probably five years and I can honestly say it's the best organization I ever was affiliated with because there is an awful lot of leadership and there are no bosses and it's a good atmosphere.

Q. I'm going to show you Exhibit Number 74 Mr. Hurley.

A. Okay.

Q. Would you describe Exhibit Number 74 please?

A. It's a pin with a safety clasp. It says, "Say No to Drugs. Celebrate with Pride."

The first year of it the South Boston Allied War Veterans Council paid for them.

Q. Let me develop that by a couple of questions. Were those [384] pins purchased by the South Boston Allied War Veterans Council?

A. Yes, Sir.

Q. when?

A. In 1888, 1889.

Q. And were they distributed by the South Boston Allied War Veterans Council in connection with the St. Patrick's Day/Evacuation Day Parade?

A. Yes, they were distributed all over, whatever way we can get them out. The parade was responsible for the distribution of a lot of those pins? We put them out probably two weeks before. In fact, you don't wear them just the day of the parade. You wear them all year round because there is a profound message in it.

Q. And there has been an effort, hasn't' there, Mr. Hurley, to cut down the drinking in South Boston on parade day?

A. We've been very successful on that. We've gone down from, years ago, having ninety-five, ninety-six arrests, down to, a couple of years ago, not '92 or '93 but prior to that, to one or two arrests for not just the parade but for the night too.

You don't have many arrests or problems during the parade. It's afterwards when you have to figure that with a town of 38,000, you have 600,000, coming in, there [385] is bound to be somebody that ma and paint watching so they raise heck and they get into problems.

Q. How many taverns and bars are shut down on parade day, Mr. Hurley?

A. I'd say almost 60%.

Q. Has that helped in the drinking department?

A. Oh, yes. It has. They also have a truck that goes around. Somebody might be going around with a case of beer and the policeman will take it, put it in the truck and squish it up. So that has alleviated — In fact, it has almost eliminated the public drinking.

Q. The Gillette Corporation supported the SO BAD program, is that correct?

A. Yes.

Q. You described earlier, the float. Is that correct?

A. Yes.

Q. It was pulled by Gillette?

A. They are the sponsors of SO BAD.

Q. You also testified, or someone did, that the reduction in drinking enhanced the parade and more people have come — attended.

A. We gained an awful lot of bands. We have a Troy High School Band that comes in with 250 youngsters. They have a chance to go to Dublin, Ireland or go back to South [386] Boston. The director of music let the kids vote and they voted to come back to South Boston because they got treated so well there. I do send them either leprechauns or shamrocks and one year I sent them the pins that I just showed and they all proudly wore them down the street.

So, definitely they would not be here if the situation was like it was eight or ten years ago.

Q. So that the parade has evolved, hasn't it, over the years?

A. It has. Yes.

Q. You've read histories of the parade haven't you?

A. Yes, I have.

Q. In 1901 there were torchlight parades?

A. Sometimes they'd have four or five parades that week. I remember when I was a youngster there was four parades in the one week leading up to — these were at night, leading up to the St. Patrick's Day Parade.

Q. and over the years the nature and character of the parade has changed, hasn't it?

A. Yes, it has.

Q. And the South Boston Allied War Veterans Council has had permits since approximately 1947?

A. That's correct.

[387] Q. And since 1947 the character and nature of the parade has changed?

A. Well, it's changed. I wasn't around then and in the veteran's circle. It was a great parade and still is. Then it got so that it was a drinking day and we just had the last five or six years to knock the nonsense off. That went for — It came up, let's go to Wacko's house. He's a big offender. Well I had to shut it off too so it's a community effort.

Q. In the last several years, has it become your testimony, that it's a great family event?

A. Yes, everybody comes back to see their family. At Christmas time you can only see your family that one day and so some come Christmas Eve and some come Christmas Day and some come a week later.

St. Patrick's Day is not a week event in the parade. It's a one-day. So that the families do get together and they haven't seen each other since the last St. Patrick's Day Parade.

So it is a very very profound family day. It's a happy day.

Q. In your rosters that used to be printed by the city, would you mention certain people and honor their names or their memory in the rosters annually?

[388] A. Yes, in the program, for instance, if we had a police man or a fireman that got killed in the line of duty or we got a veteran that was a member of the Council that died, we would put his name in, an in memorium type of thing. And for the ones who are alive if somebody gives you some work or is a good guy you put him down and give him an honorary title, as assistant chief of staff or honorary chief marshall or something like that.

Q. And you hustle as much money for that parade in any way that you can don't you?

A. Any way that it will come in.

Q. And if the mayor wanted to generate some interest in the parade on behalf of the parade committee, it is welcome, isn't it?

A. Absolutely. If he wanted to do it two or three times a year we'd accommodate him.

Q. And you testified earlier that on the fire equipment that is on the parade it serves several purposes doesn't it, that equipment?

A. Yes, the main purpose of the fire engines there, of course, especially for the youngsters is to see the trucks out there. But its primary purpose in going down the street is that we have people that come over to our town about nine o'clock and they get a little restless by [389] the time the parade come by their point.

So they are all out in the street, their minds are wandering a little there. So when the fire trucks come by it's a safety measure to push them back onto the sidewalk so that you do have enough sense to get on the sidewalk and the parade comes along in fifteen minutes. So it's a good area so the bands can perform.

Q. In the event that there is a fire or some other emergency there is also equipment on the streets, ambulances and fire engines?

A. Right. Oh, absolutely. And they still have apparatus in the barns.

Q. Now, there was some testimony about radio stations. How do the radio stations, whether or not they are sponsors, assist in the conduct or promotion or safety of the parade?

A. Well, there is one of the radio stations that had a contest. The contest was awarding some type of T shirts and probably some tickets to some performance or something. They keep advertising "You win when you come to Southie." Things like that.

The other radio station, the Irish one, they give us a lot of mileage for nothing and we just give them the opportunity to come in and we do not charge them. A [390] little payback.

Q. You saw the tape of the 1993 parade?

A. Yes.

Q. Not included in the parade were the Hibernians. Is that correct?

A. That's correct.

Q. I show you Exhibit Number 38. Is that the registration form?

A. Yes, Sir. It is.

Q. Who is that from?

A. That is from Paul Costello who is from the South Boston Ancient Order of Hibernians. Under "remarks," he says he has been instructed by the national president that his group cannot march in the parade if the GLIB organization is allowed to march in it.

Q. Would you briefly describe this?

A. This is a letter from one of the commanders of the existing Allied War Veterans Council, the South Boston VFW.

It was sent to the chief marshall, from the commander, informing the chief marshall that they cannot come into the

parade. The cause of the ruling was the GLIB organization marching in the parade.

Q. Did they march in the parade?

[391] A. They've marched in the parade ever since 1947 or so. They never missed. I think they missed this year for the first time.

Q. Did they state their reasons in that exhibit?

A. Yes, they did.

Q. Exhibit 39 —

THE COURT: I'm sorry, what is that Exhibit number?

MR. DARLING: Fifty, 5-0. I'm sorry.

Q. I show you Exhibit number 39. Can you identify this?

A. It's from the Immaculate Heart of Mary band. It's a great band; nice youngsters in it and they had stated that they will be in the St. Patrick's Day/Evacuation Day Parade in '93 on this form here.

However, they did cancel out once the GLIB organization was permitted in the parade by court order.

Q. We have an unmarked exhibit. Can you identify this please, Mr. Hurley?

A. This is the Right to Life. There is also a group, The Immaculate Heart of Mary Marching Band.

This scene was taken in Perkins Square, South Boston?

THE COURT: Are you offering it in evidence?

MR. DARLING: Yes, Your Honor.

[392] MR. CRONIN: No objection.

MS. McKELWAY: No objection, Your Honor.

THE COURT: It will be marked and received as Exhibit 106.

(Exhibit 106, marked; Photograph.)

Q. Do you see St. Patrick there, in Exhibit 106?

A. Yes, I do.

Q. Do you happen to know who he is?

A. That's Brother Joe.

Q. St. Patrick in the form of Brother Joseph didn't march in the '92 or '93 parades, did he?

A. No, he didn't.

Q. Mr. Hurley, going back a few years, you were the chief marshall in 1964. Is that correct?

A. Yes.

Q. Did the NAACP seek to march in that year?

A. Yes.

Q. What was the response of you personally? Did you receive the inquiry?

A. We received the application, brought it before the Allied Council. The Allied Council voted to allow the NAACP in the St. Patrick's Day/Evacuation Day Parade in 1961.

Q. You know the NAACP is not an Irish pipe band is it, Mr. Hurley?

[393] A. No. It isn't.

Q. Did you have discussions with them as to what form they would take when they marched? Would you give us a little insight as to how the process worked?

A. Well, at that time we told them that their float would have to be patriotic or Irish in nature.

Q. Did they conform to that?

A. They did.

Q. I'm asking you individually, Mr. Hurley, because we can't walk into the mind of the veterans why they decided to accept it. What was your understanding of why that group wanted to march?

A. Well, they were fighting for their civil rights. We figured the Irish did that years ago and probably still are so that was the basis of my vote.

* * *

[413] Now, Mr. Hurley, have you or the Veterans ever excluded any individual from participating in the St. Patrick's Day Parades because of their sexual preference?

A. Not knowingly, no.

Q. I'm sorry?

A. No, never have, not knowingly.

* * *

[417] Would you define the responsibilities and duties of a parade adjutant, please?

A. Well —

Q. As a matter of fact, would you describe — fine, answer the question.

A. The parade adjutant sets up the parade in cooperation with the Allied Council, the chief marshall, and the chief of staff, probably working [418] eight or nine months, whatever it takes in the Council's experience. Then it goes right up to the day of the parade and he can make any decision that he wants as to late entrants because we do have people that try to get in, you know, the day of the parade or the day before.

Q. Well, in the tape we saw, that was the '93 parade, right?

A. Yes, sir.

Q. In the '93 parade the Bruins marched and they were admitted in at the last minute; is that correct?

A. I didn't see the Bruins until probably 20 minutes before parade time on the morning of the parade.

Q. And did you have the authority to admit them on the spot?

A. Yes, I did.

Q. And is that authority part of the responsibilities of the parade adjutant on parade day —

A. Yes.

Q. — to take care of the last-minute stuff?

A. Everything we do — most of the things we do from the Allied Council is — over the years it caused [419] confusion, so —

Q. When there are groups like GLIB, or the KKK, or, for a period of time, the Right to Life, and NORAD, there was

continual discussion amongst the Veterans and the Council as to whether to admit a group that perhaps we could characterize as controversial; is that right?

A. That's right.

Q. And if the Bruins showed up with the Boston Celtics and the Boston Red Socks, would you let them all march?

A. I certainly would. That would be my judgment call. It would be for the betterment of the parade.

Q. I trust you'd be happy to have them all?

A. I certainly would.

* * *

[485] JOHN J. "WACKO" HURLEY, RECALLED.

EXAMINATION
(By the Court):

Q. I want to be as complete and as clear as I can, so I'll ask you to indulge me.

You testified earlier that your view in '92 would be the same today, that you would be opposed to GLIB's participation because of the inclusion in their contingent of members, you understand — of persons you understand to be members of Act Up and/or Queer Nation; is that right?

[486] A. That's correct, sir.

Q. Okay.

And the basis for that position is that the view of such persons, you understand, are repugnant to the values of the parade, or such persons could not be counted on to be orderly, or what is it you're focusing on in drawing the distinction that you have?

A. Well, I'm glad you asked that question, your Honor, because this has been going on for a couple of years. And the message that we're trying to put out there is the Allied War Veterans Council and John "Wacko" Hurley have no — none

whatsoever — feelings of any nature against the gay/lesbian, male/female, whatever.

We do and we will continue to have animosity against radical groups that are trying to come into our town, throw condoms around, give us various hand gestures and whatever. And I'm here to give credit to our town. I think they've taken 50 paces backwards since they started this nonsense two years ago.

So, my beliefs are still the same, sir.

Q. Thank you, sir. I'm not sure I understand you.

[487] Is it your view that any contingent including such persons has to be excluded on account of what you understand to be their values and views contrasted with your own, or is it your position that any contingent including such persons has to be excluded because they cannot be counted on to march in an orderly way?

A. Well, there are two parts there, sir. I think I do only have one vote and I would use it. And I have one voice and I'd use that to keep a group out that — not to just keep them out because they don't think my ways. If that was so, then there wouldn't be anybody marching in the parade because I do have ideas.

But any group that wants to can enter the parade — they're certainly welcome — but not when they are radical groups going against our traditional values of our town and our people. Years ago —

Q. Wait, sir.

So that even if you could count on their orderliness, because of the repugnance of their views to you, you would recommend against any contingent that includes such persons?

A. Yes, sir.

Q. Okay; that answers my question, Mr. Hurley.

Supreme Court, U.S.
FILED
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No. 94-749

# In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHN J. HURLEY, INDIVIDUALLY, AND THE SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,
PETITIONERS,

*v.*

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, AN UNINCORPORATED ASSOCIATION, BY AND THROUGH TIMOTHY DALEY, BARBRA KAY, AND CATHLEEN FINN, ACTING ON THEIR OWN BEHALF AND ON BEHALF OF MEMBERS OF THE ASSOCIATION,
RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS.

## BRIEF FOR PETITIONERS

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts violated the First and Fourteenth Amendment rights of the Petitioners when it compelled the Petitioners to include, in their privately organized Parade, conducted in a traditional public forum, a message the Petitioners deemed unwanted and antithetical?

II. Whether Petitioners' refusal to include a gay, lesbian and bisexual message within a private parade can be declared by the government unlawful discrimination, without violating the First and Fourteenth Amendments?

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No. 94-749

# In the Supreme Court of the United States

OCTOBER TERM, 1994

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JOHN J. HURLEY, INDIVIDUALLY, AND THE SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,
PETITIONERS,

*v.*

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, AN UNINCORPORATED ASSOCIATION, BY AND THROUGH TIMOTHY DALEY, BARBRA KAY, AND CATHLEEN FINN, ACTING ON THEIR OWN BEHALF AND ON BEHALF OF MEMBERS OF THE ASSOCIATION,
RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS.

## BRIEF FOR PETITIONERS

## OPINIONS BELOW

The Opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts in *Irish-American Gay, Lesbian and Bisexual Group of Boston & others* v. *City of Boston & others*, SJC-06498 (July 11, 1994), is included in Appendix C to the Petition for Writ of Certiorari (C1). The Opinion and Judgment of the Superior Court of the Commonwealth of Massachusetts, *Irish-American Gay, Lesbian and Bisexual Group of Boston* v. *City of Boston, South Boston Allied War Veterans Council, and John J. Hurley*, Superior Court Civil Action No. 92-

1518A (December 15, 1993) is included in Appendix B to the Petition for Writ of Certiorari (B1).

## JURISDICTION

On March 11, 1994, the Supreme Judicial Court of the Commonwealth of Massachusetts affirmed the Judgment and Order of the Superior Court, dated December 24, 1993. *See* Petition for Writ of Certiorari, Appendices C and B, respectively. On July 11, 1994, the Supreme Judicial Court issued its Opinion. 418 Mass. 238, 636 N.E.2d 1293 (1994). A Petition for Rehearing, after extensions of time were granted by the Supreme Judicial Court, was timely filed and was denied on July 26, 1994. *See* Petition for Writ of Certiorari, Appendix D (D1).

The Writ of Certiorari was granted by this Court on January 6, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves portions of the First and Fourteenth Amendments to the Constitution:

> "Congress shall make no law . . . abridging freedom of speech . . ."

U.S. Constitution, Amendment I.

> "Nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

U.S. Constitution, Amendment XIV, § 1.

## STATUTES INVOLVED

The statute involved in Massachusetts General Law chapter 272, sections 92A and 98. M.G.L. c. 272, §§92A and 98.

## STATEMENT OF THE CASE

At issue in this case is: (1) whether, without violating the First and Fourteenth Amendments, the Commonwealth of Massachusetts may compel Petitioners John J. Hurley and the South Boston Allied War Veterans Council (Veterans) to include the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB), Respondents, as a group, marching under its own banner, in the Veterans' annual St. Patrick's Day/Evacuation Day Parade; and (2) whether the First and Fourteenth Amendments were violated when the government declared the Veterans' refusal to include GLIB's message in the Veterans' Parade "discrimination based on sexual orientation," in violation of a penal public accommodation statute.

The Veterans Council is a private, unincorporated, non-profit, charitable organization of elected and appointed representatives from American Legion, Disabled Veterans, and Veterans of Foreign Wars Posts in South Boston. (Tr. 371-72.) The Veterans have annually applied for and received a parade permit from the City of Boston, and have organized and conducted their annual St. Patrick's Day/Evacuation Day Parade in South Boston since 1947. (J.A. A98.)

GLIB was formed in January 1992, to march in the St. Patrick's Day/Evacuation Day Parade.[1] *Irish-American Gay, Lesbian & Bisexual Group of Boston* v. *City of Boston*, No. 92-1518A (Mass. Super. Ct. Dec. 15, 1993), *aff'd*, 418 Mass. 238, 636 N.E.2d 1293 (Mass. 1994), *cert. granted*, 115 S.Ct. 714 (Jan. 6, 1995) (Pet. for Cert. at B3) [hereinafter *Irish-American Gay*]. The stated purposes of GLIB for marching in the Veterans' Parade were: (1) to express its members' pride in their dual identities; (2) to demonstrate to the Irish-American, and to the gay, lesbian and bisexual communities the diversity within those respective communities; and (3) to show support for the Irish-American gay, lesbian and bisexual men

[1] Barbra Susan Kay, the co-founder of GLIB, testified at trial that GLIB had no set criteria for membership and that people "can be members of the group as long as they support our stated goals." (Tr. 98.)

and women in New York City ("ILGO" members) who were seeking to participate in the New York St. Patrick's Day Parade. *Irish-American Gay* (Pet. for Cert. at B3).

GLIB formally applied to march in the 1992 parade soon after the group's formation in January of 1992. (Tr. 65-66.) The Veterans denied GLIB's request to march in their Parade, citing "safety reasons and insufficient information regarding [the] social club." (J.A. A60; Tr. 64, 65.) On March 10, 1992, GLIB filed a complaint against the Veterans and various officials of the City of Boston, pleading a number of claims, with a principal allegation that the Veterans were state actors. (J.A. A2.) On March 11, 1992, the Suffolk Superior Court issued the requested restraining order forbidding the Veterans from excluding GLIB from the 1992 Parade. (J.A. A2.) On March 15, 1992, GLIB marched in the Veterans' 1992 St. Patrick's Day/Evacuation Day Parade. *Irish-American Gay* (Pet. for Cert. at B3).

On December 23, 1992, the Veterans obtained a permit from the City of Boston for their annual Parade to be held on March 14, 1993. (Ex. 13; Tr. 176.) In early January 1993, GLIB again requested to participate as a unit in the upcoming Parade. (Ex. 44; Tr. 176.) The Veterans again refused to admit the group, (Ex. 42; Tr. 176), asserting that the decision "to not permit any groups with any sexual themes to march was merely a formalization of the fact that [the Veterans Council] has a traditional parade expressing its religious and social values." (J.A. A49; Tr. 176.)

On February 2, 1993, GLIB amended its still-pending 1992 complaint against the Veterans and the City of Boston to seek declaratory and injunctive relief concerning the 1993 Parade. (J.A. A5-A14.) The Amended Complaint added the allegation that the Veterans violated the public accommodation law, and it retained the allegation that the Veterans had unlawfully excluded GLIB from participating in the Veterans' 1992 and 1993 St. Patrick's Day/Evacuation Day Parades in South Boston, in violation of the First and Fourteenth Amendments to the United States Constitution, and Articles 1 and 16 of the Massachusetts Declaration of Rights, in that the exclusion of GLIB constituted state action. (J.A. A12.)

On February 22, 1993, the Superior Court granted GLIB a preliminary injunction compelling the Veterans to allow GLIB to march in the 1993 Parade. (J.A. A2.) The preliminary injunction was affirmed on the Veterans' appeal to the Massachusetts Appeals Court on March 1, 1993. (Pet. for Cert. at B5.) On March 3, 1993, relief was sought and denied by the Supreme Judicial Court. The Veterans filed an action seeking relief in federal court on March 9, 1993. The federal court abstained and dismissed the action on March 11, 1993. *South Boston Allied War Veterans Council* v. *Zobel*, 830 F. Supp. 643 (D. Mass. 1993).

GLIB marched under court order in the Veterans' 1993 Parade. (*See* Ex. 84; Tr. 176.)

On April 16, 1993, the Veterans filed an Answer to GLIB's Amended Complaint in Suffolk Superior Court, and cross claimed against the City of Boston, claiming an infringement of their First Amendment rights pursuant to 42 U.S.C. § 1983. (*See* Pet. for Cert. at B23) ("The Veterans argue that their Parade is a form of speech protected by the First Amendment via the Fourteenth Amendment, and that their speech will be effectively diluted or distorted if they are required to include GLIB in their Parade.")

In November of 1993, the Superior Court conducted a four-day bench trial. The Veterans again asserted their First Amendment rights as defenses to GLIB's claims, contending that the First Amendment precluded the state from applying the public accommodation statute to the 1993 Parade, (Tr. 528), and, further, that the Parade did not constitute a public accommodation under Massachusetts law. (J.A. A69-A71.) The Veterans also asserted that the city had infringed on their First Amendment rights. (See, e.g., J.A. A69-A75.)

On December 15, 1993, the Superior Court issued its Judgment. It found no state action and dismissed all claims against the City of Boston. (Pet. for Cert. at B14.) The trial judge further found that the Veterans "acted as a private party," *id.* at B22, and consequently dismissed GLIB's constitutional claims against them. *Id.* He found that the Veterans did not generally inquire into the specific messages of the groups which

applied to march, had no written standards or procedures for selecting participants, and were not selective in choosing the diverse groups which participated in the Parade. *Id.* at B6-B9. Citing "the lack of genuine selectivity in choosing participants and sponsors," *id.* at B6, the court found that the Parade is a public event, *id.*, with no specific expressive purpose. *Id.* at B25. ("Given the Veterans' lack of selectivity in choosing participants and failure to circumscribe marchers' messages, it is impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment.")

In disposing of the Veterans' First Amendment claims, the trial court found that the Veterans, in their Parade, espoused a myriad of themes, values and messages. *Id.* at B24. The trial court also found, "that GLIB would be excluded because of its values and its message, i.e., its members' sexual orientation", *id.* at B4 n.5, and, "[t]he evidence establishes that GLIB was excluded from the Parade on account of its members' sexual orientation." *Id.* at B4. The trial court also found that the Parade constitutes a public accommodation under Massachusetts law and ruled that "the Veterans' exclusion of GLIB based on the sexual orientation of its members violates the public accommodation statute." *Id.* at B9.

The trial court stated in summation: "History does not record that St. Patrick limited his ministry to heterosexuals or that General Washington's soldiers were all straight. Inclusiveness should be the hallmark of their Parade." *Id.* at B28. The Veterans were "permanently enjoined from preventing plaintiff GLIB from participating in the St. Patricks'/Evacuation Day Parade because of the group members' sexual orientation." The court "further ORDERED that the defendant Council shall allow plaintiff GLIB to participate in the parade in the same manner and under the same terms and conditions applicable to all other participants in the parade." *Id.* at B28-B29.

On February 16, 1994, the Veterans appealed the Superior Court's decision to the Massachusetts Supreme Judicial Court and were granted direct appellate review. The Veterans argued that the Parade constituted expressive activity protected by the First Amendment, asserting their rights to free speech, expressive

association, and freedom from being compelled to communicate or foster views in which the Veterans did not believe. The Veterans further argued that the public accommodation statute was constitutionally invalid as applied and facially vague and overbroad. *Irish-American Gay, Lesbian & Bisexual Group of Boston* v. *City of Boston*, 418 Mass. 238, 248-49, 636 N.E.2d 1293, 1298-99 (Mass. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995).

On March 11, 1994, the Supreme Judicial Court issued an order affirming the Superior Court's decision, and noted that written opinions would follow. (J.A. A1.) On March 14, 1994, the Veterans filed an application for Stay of the Orders of the Supreme Judicial Court and Superior Court before this Court. The Stay was denied (Souter, J.). Consequently, the Veterans cancelled their 1994 Parade.

On July 11, 1994, the Supreme Judicial Court issued its opinion. *Irish-American Gay*, 418 Mass. 238, 636 N.E.2d 1293 (1994).

Applying a "clearly erroneous" standard, *id.* at 242, 248, 250, 636 N.E.2d at 1295, 1298, 1299, the Supreme Judicial Court upheld the trial court's findings of fact, and rejected the Veterans' First Amendment claims:

> [W]e need not decide whether the free speech rights or the expressive association right, or both, might be implicated by the factual situation asserted by the defendants. This is so because, as the judge found, it is "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment."

*Id.* at 249, 636 N.E.2d at 1299.

The Supreme Judicial Court also rejected the Veterans' claim that requiring the inclusion of GLIB in the Parade would force the Veterans to promote a message they did not endorse. *Id.* at 250 n.19, 636 N.E.2d at 1299-1300 n.19. The Supreme Judicial Court affirmed the trial court's ruling that the Parade was a public accommodation and stated: "[T]he burden was on the [Veterans] to demonstrate that they were exercising

their First Amendment rights and as a result were entitled to exemption from the public accommodation laws." *Id.* The Supreme Judicial Court rejected the Veterans' attacks on the statute. *Id.* at 251-52, 636 N.E.2d at 1300-01.

In dissent, Justice Nolan wrote: "One must strain to recall or even imagine such an obvious violation of the revered right to free speech." *Id.* at 253, 636 N.E.2d at 1301 (Nolan, J. dissenting). Citing *Wooley* v. *Maynard*, 430 U. S. 705 (1977), Justice Nolan stated, "regardless of whether the parade has one message, ten messages, or no message at all, if GLIB's particular message is not in the parade, it cannot constitutionally be forced on the Veterans Council." *Id.* at 257, 636 N.E.2d at 1303. The dissent found that "[t]he judge's order clearly violated the Veterans Council's freedom of speech," *id.*, and expressive association, *id.* at 258-59, 636 N.E.2d at 1303-04; and that the trial judge's finding that the Veterans discriminated on the basis of GLIB's members sexual preference was clearly erroneous. *Id.* at 260, 636 N.E.2d at 1304.

On July 25, 1994, the Veterans filed a Petition for Rehearing with the Supreme Judicial Court (J.A. A1). On July 26, 1994, the Supreme Judicial Court denied that Petition. (J.A. A1.)[2]

The Veterans filed a Petition for Writ of Certiorari on October 24, 1994, and the writ was granted on January 6, 1995.

[2] In a separate but related series of events, on April 20, 1994, the Veterans applied to the Boston Transportation Department for a permit to hold a St. Patrick's Day Parade on March 19, 1995. *South Boston Allied War Veterans Council* v. *City of Boston*, No. 94-11402-MLW, __ F. Supp. __ (D. Mass. January 17, 1995) (1995 WL 40641), slip op. at 15. The application indicated that the Veterans added a theme to the 1995 parade: "To commemorate the support by the people of South Boston who supported the Veterans rejection of judicially-imposed messages on the parade of Sunday, March 20, 1994." *Id.* at 16. The City of Boston declined to act on the Veterans' request, and indicated that unless the Veterans agreed to comply with the Superior Court's permanent injunction, and include GLIB in the 1995 Parade, it would not issue the permit. *Id.* On July 12, 1994, the Veterans filed an action against the City of Boston in the United States District Court for the District of Massachusetts. *Id.*

On January 17, 1995, the district court held that the Veterans' protest theme represents a "material change in the controlling facts," providing "the 1995 Parade with a discernible expressive purpose that the courts of the Commonwealth found to be lacking with regard to the 1993 Parade." *Id.* at 43. Relying on the inclusion of the protest theme in the 1995 Parade, the district court declared, "The Veterans have now established that the 1995 parade will involve the exercise of their First Amendment rights to associate for expressive purposes and to free speech." *Id.* at 43-44. The district court found itself estopped by the SJC's decision from ruling on the merits of the Veterans' forced speech claim, but noted that "[t]he Supreme Court has the authority to review and, if appropriate, reverse the decision of the Supreme Judicial Court." *Id.* at 68-69.

## SUMMARY OF ARGUMENT

This case involves the most straightforward of constitutional claims: that the organizers of a private parade may define and express their own messages, free of government interference, and protected from the compulsion to express messages they choose not to communicate.

This Court should state in clear terms that parades, like books and protest marches, are a form of speech *per se*, deserving of First Amendment protection from any abridgement, intrusion or content-based evaluation by the state, subject to the usual exceptions such as obscenity. The history of this case demonstrates that any alternative holding would subject all parades to content-based evaluations and possible government intrusion.

The Supreme Judicial Court applied a "clearly erroneous" standard to the lower court's factual findings, when this Court has clearly mandated an independent review of the record by appellate courts considering First Amendment claims. Using this standard, the Supreme Judicial Court has incorrectly affirmed the trial court's finding that the Parade lacked focus, and that the protections of the First Amendment attach only to "properly" focused speech. Taken together, these actions have resulted in the denial of the Veterans' First Amendment rights, and intrusive government regulation of their speech.

Far worse, the Veterans have been compelled to convey through their Parade a message they opposed. The Superior Court held that the Veterans violated the Massachusetts public accommodation law, since the Veterans excluded GLIB "because of its values and its message, i.e., its members' sexual orientation." After equating sexual orientation with values and a message, the court then issued an injunction forcing the Veterans' Parade to convey a message that the Veterans had chosen not to communicate. "If there is any fixed star in our constitutional constellation, it is that no official high or petty can prescribe what shall be orthodox in politics, nationalism,

religion or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943).

At the same time, the Veterans' right to associate for expressive purposes has been violated. The interference by the state in the Parade is particularly burdensome to the Veterans Council since not only is the Parade the Veterans' speech, it is their principal expressive activity. As a result, the Veterans alone are constitutionally permitted to determine the composition and content of this speech. The Commonwealth's interest in preventing discrimination in places of public accommodation is not implicated by the exclusion of GLIB, since the Veterans do not discriminate against homosexuals in admittance of participants to the Parade. Nor can the Commonwealth's interest support compelling speech.

The decisions of the Massachusetts courts in this case have led directly to two grave harms that the First Amendment was enacted to prevent: in 1992 and 1993, the Veterans' traditional message was distorted by the state's forced inclusion of GLIB; in 1994 the parade was cancelled so as to prevent a continuance of this unconstitutional distortion.

Now that the Supreme Judicial Court has applied the Massachusetts public accommodation law to protected speech such as the Veterans' Parade, and has construed these laws to require not only inclusion of persons but inclusion of their messages as well, it is clear that these laws are unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the U.S. Constitution.

When the trial judge and the Supreme Judicial Court saw the first color guard, and heard the first strains of patriotic and cultural music captured in the videotape of the Veterans' Parade, their inquiry into the content of the Parade should have ended.

## ARGUMENT

### I. THE VETERANS' PARADE IS THEIR EXPRESSION, THE CONTENT OF WHICH IS PROTECTED BY THE FIRST AMENDMENT AGAINST GOVERNMENT CONTROL.

In the Massachusetts decision now before this Court, the dissent wrote:

> Today will be regarded as a sad and frustrating day in the history of the First Amendment. Today, a majority of this court upholds, and thereby endorses, a trial judge's flagrant violation of the free speech rights of citizens of this Commonwealth. The majority acquiesces in a judge's order instructing a private group that if it wishes to express itself at all, it must include in its expression a particular idea, one with which the group does not agree. One must strain to recall or even imagine such an obvious violation of the revered rights to free speech.

418 Mass. at 238, 636 N.E.2d at 1301 (Nolan, J., dissenting).

#### A. *A Parade Is Inherently Expressive — Speech* Per Se.

"A parade is, by its nature, a pristine form of speech." *New York County Board of Ancient Order of Hibernians* v. *Dinkins*, 814 F. Supp 358, 366 (S.D.N.Y. 1993). *See Cox* v. *New Hampshire*, 312 U.S. 569 (1941); *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969); *Invisible Empire of the Knights of the Ku Klux Klan* v. *Mayor of Thurmont*, 700 F. Supp. 281, 286-97 (D.Md. 1988); *cf. Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 152 (1969). "Every parade is designed to convey a message. As such, a parade organized by a private sponsor is the quintessential exercise of the First Amendment right of freedom of expression." *Dinkins*, 814 F. Supp. at 366.[3]

[3] *The Oxford English Dictionary* (OED) gives as the third definition of the noun "parade" (after "show," "display," and "assembling or mustering of troops"): "A march or procession; esp. In *U.S.*, a procession organized on a grand scale, in support of some political object." (Emphasis in original.) OED *s.v.* "Parade" *sb.*, 1.3. The definitions of the verb to "parade," except the purely military sense of

The Veterans' St. Patrick's Day Parade has historically and consistently celebrated the Veterans' religious and social values. (J.A. A49; Tr. 176.) The Veterans could have written a book promoting their values, or staged a play, or perhaps circulated pamphlets, and each of those media would have afforded their speech First Amendment protection. The Veterans chose, instead, to organize and conduct their Parade on a street, a quintessential public forum.[4] In deciding what messages to include in their Parade, it is well settled, "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how they want to say it." *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988). "The First Amendment protects [the Petitioners'] right not only to advocate their cause, but also to select what they believe to be the most effective means for so doing." *Meyer* v. *Grant*, 486 U.S. 414, 424 (1988). The very purpose of the First Amendment is to foreclose public authorit[ies] from assuming a guardianship of the public mind. . . ." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945).

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assembling the troops for inspection, all include the idea of showing off. To parade is to march or walk, "esp. For the sake of 'showing off.'" OED *s.v.* "Parade" *vb.* I.2-6. There is thus by definition an expressive element even in the most festive and least political of "parades."

[4] It is well-settled that public places "historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered . . . public forums" for such expressive activity. *United States* v. *Grace*, 461 U.S. 171, 177 (1983); *see Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), *citing Hague* v. *Committee for Indus. Org.*, 397 U.S. 496, 515 (1939). In *Heffron* v. *International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981), this Court stated, in discussing time, place and manner restrictions: "A major criterion . . . is that the restriction 'may not be based upon either content or subject matter of speech.'" *Id.* at 648, *quoting Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 536 (1980). The Massachusetts courts flagrantly violated this major criterion, examining the content of, then imposing a message on, the Veterans' Parade.

> For while a municipality may constitutionally impose reasonable time, place and manner regulations on the use of the streets and sidewalks for First Amendment purposes... and may even forbid altogether such use of some of its facilities . . . what a municipality may not do under the First and Fourteenth Amendment, is to discriminate in the regulation of expression on the basis of the content of that expression . . . Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.

The Third Circuit in *Tacynec* v. *City Philadelphia*, 687 F. 2d 793, 796 (1982), in deciding whether the exclusion of a marching band from a city-run parade was a reasonable restriction, noted: "[T]he Supreme Court has made it clear that '[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musicals and dramatic works, fall within the First Amendment guarantee.'" (citations omitted). *Tacynec* also found that the marching band's performances were "a form of cultural expression." *Id.* at 796.

Parades organized by private sponsors, containing a variety of participants and themes, have been accorded constitutional protection by lower courts. *See, e.g., Long Beach Lesbian-Gay Pride, Inc.* v. *City of Long Beach*, 17 Cal.Rptr.2d 861, 865-67 (Cal. Ct. App. 1993) (festive parades with cars, floats, and pedestrians commemorating homosexual rights movement and celebrating participants' pride in their sexual orientation, entitled to constitutional protection); *New York County Bd. of Ancient Order of Hibernians* v. *Dinkins*, 814 F. Supp. 358, 361-63 (S.D.N.Y. 1993) (celebratory parade with over 150,000 marchers, designed to honor St. Patrick, entitled to constitutional protection.) *See also Gregory* v. *City of Chicago*, 394 U.S. 111, 112 (1969) (Marching and parading, "if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment.").

The Massachusetts courts erred by attempting to determine whether the message or messages of the Veterans' Parade were expressive enough to constitute speech or expressive activity protected by the First Amendment. Once it was acknowledged that the parade was a lawful celebration attempting to express something, no further inquiries into content should have been made. To examine the content of speech for quality or harmony or clarity is to apply a content-based standard, which is impermissible. *See Consolidated Edison*, 447 U.S. at 530 (1980).

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(*footnote 4 cont'd*) *Hudgens* v. *National Labor Relations Board*, 425 U.S. 507, 520 (1976), citing *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1971); *see Boos* v. *Barry*, 485 U.S. 312 (1988); *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989).

1. The Parade Has a Theme and Clear Messages Which Are Selected by the Veterans.

The St. Patrick's Day/Evacuation Day Parade is in its totality a celebration of the Veterans' religious and social values. (J.A. A49.) In addition to entertainment, the Parade is replete with unmistakeable political, cultural, religious, and military messages and themes — all selected by the Veterans, and identified by the trial court as "interests and viewpoints" (Pet. for Cert. at B7.)[5] *See Riley*, 487 U.S. at 796 ("Thus where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.")

Contrary to the findings of the trial court, the Veterans were selective in whom they allowed to march. Participants are sent an application form which asks them to explain the nature of the group seeking to march. (Ex. 4; Tr. 176.) The uncontroverted trial testimony was that between 90% and 95% of all participants were repeat participants. (J.A. A93.) Mr. Hurley testified, with so many repeat participants, "[y]ou don't have to go back every year for one group that has been accepted." *Id.* New applications are evaluated by the Council and voted individually on the basis of each member's beliefs. (J.A. A93; Tr. 292, 432, 433.) "We're all individuals. We have one vote." (J.A. A93.)

[5] A videotape of the 1993 Parade reflects the following: Color Guards from various Veterans Posts; Irish Flags, American Flags, Flags asking viewers to Remember Our POWs; "South Boston Against Drugs" float; Senate President William Bulger with his Irish shillelagh; Boston Police Bagpipe Band with sign: "Boston Police, Pipes and Drums, Gaelic Column"; Boston Gaelic Fire Brigade Fife & Drum; Flags, banners and trucks bedecked with shamrocks; Miss Ice-O-Rama; Miss South Boston; politicians wearing carnations, tams and green scarves; Baptist Bible Trolley; a banner declaring "Christ, the Way, the Truth, and the Life"; a huge Irish leprechaun float; McGruff the Dog with a sign, "Take a Bite Out of Crime"; Princemen Singing Choir; NORAID; "England out of Ireland" sign; flag saying "Britain's Border — Berlin Wall"; Bishop St. Patrick marching; the acrobatic cycling Murrays wearing kelly green shirts and white hats with shamrocks on them; bands playing traditional Irish songs: An *Irish Lullaby*, *Four Green Fields*, *The Rising of the Moon*, *The Rakes of Marlow*, *The Minstrel Boy*; and one band playing, *Southie Is My Home Town*. (Ex. 84; Tr. 176.)

To ensure the traditional content of the Parade, the Veterans excluded certain groups from marching and circumscribed the messages of others. (J.A. A79, A86-A88, A91-A93.) Contrary to the findings of the trial court, the Veterans were selective in whom they allowed to march. Petitioner John J. Hurley repeatedly stated at trial that groups were excluded "because they were not going with our traditional values and they were sending out a message that we felt we did not want our families to see." (J.A. A87-A88; *see also* Tr. 320.) When asked how GLIB's participation was denied, Hurley testified it was by unanimous vote of the Council. (J.A. A86.) The Veterans at one time or another have excluded, not only GLIB, but also ROAR (an anti-busing group), the Ku Klux Klan, and a truck carrying anti-homosexual messages. They have also circumscribed the messages of Mass. Citizens for Life (a pro-life float) and NORAID (Northern Irish Aid group). (J.A. A79, A86-A88, A91-A93.) John J. Hurley testified that there had been continual discussion amongst the Veterans as to whether to admit groups that could be characterized as controversial. (J.A. A103-A104.) Despite this record of control and exclusivity, the Supreme Judicial Court found these exclusions and circumscription of messages to be of "no legal relevance." *Irish-American Gay*, 418 Mass. 244 n.10, 636 N.E.2d at 1296 n.10. The Supreme Judicial Court glossed over these facts and concluded: "The findings of the judge suggest that virtually any member or group drawn from the public may apply or pay to enter the parade." *Id.* at 247 n.13, 636 N.E.2d at 1298 n.13.

The uncontroverted trial testimony of various witnesses demonstrates the error of the trial judge's characterization. A Deputy Superintendent of the Boston Police Department testified that the police would try to evict any person or group showing up and marching without the Veterans' permission. (J.A. A79.)[6] In a Parade consisting of up to 10,000 marchers, (Pet.

[6] Trial testimony of Boston Police Superintendent, Thomas P. Maloney.

Q. And if there is someone in a — let's confine ourselves to the 1992 parade, Superintendent. If a group jumped into the line of march, that was not listed on the roster, and was observed by yourself or your colleagues, what next would happen?

A. We probably would have consulted with the parade organizers to find out if they approved or concurred with this other group into the parade. If they did not, we would try to eject them from the parade route. (J.A. A79.)

for Cert. at B9), the trial court could not point to a single case where a person or group showed up, paid a fee and marched without the Veterans' permission.[7]

Given the testimony at trial, the trial court's conclusion that the Veterans' Parade was an "open recreational event" strains credulity. (Pet. for Cert. at B27.)[8]

2. The First Amendment Protects Speech, Regardless of Whether the Expression is Narrowly Focused, Includes Multiple Messages, or the Speaker is Able to Articulate an Expressive Purpose.

The First Amendment secures the Veterans' right of freedom of speech and guarantees their right to construct a parade of their own liking and to invite those whose messages are in harmony with the Veterans' notion of how the event should be celebrated. *See*, e.g., *Riley*, 487 U.S. at 790-91. As Justice Nolan argued in his dissent, "[T]he Veterans Council does not need a narrow or distinct theme or message in its parade for it to be protected under the First Amendment." *Irish-American Gay*, 418 Mass. at 256, 636 N.E.2d at 1303. "We have never been in the business of protecting only internally consistent, narrowly focused, politically sensitive speech." *Id.* at 261, 636 N.E.2d at 1305 (Nolan, J., dissenting.) It would be a sad day, indeed, if only those who could deliver a perfect speech, direct a perfect play, produce a perfect movie, or run a "proper" parade, were entitled to protection under the First Amendment. When the trial court stated, and the Supreme Judicial Court affirmed the notion, that "a proper celebration of St. Patrick's

[7] In fact, out of 10,000 marchers, the Supreme Judicial Court and trial court could point to only six Boston Bruin hockey players who showed up on parade day and marched — and they marched only after receiving approval from Hurley at the request of the Mayor. (Tr. 366; J.A. A104.)

[8] The Veterans Council is the holder of a parade permit. The city issues parade permits to private groups seeking to run parades. The city issues what are called "Play Street Permits" for "recreational events." (Tr. 184.) If the city believed that the Parade were an "open recreational event" as the Parade was characterized by the trial judge (Pet. for Cert. at B27), it would have issued the Veterans a "Play Street Permit." When asked at trial, "Does any part of the St. Patrick's Day Parade involve activities that require a Play Street Permit?," Assistant Transportation Commissioner William Good answered, "No." (Tr. 185.)

Day and Evacuation Day requires diversity and inclusiveness. . . ," (Pet. for Cert. at B24), the courts of the Commonwealth of Massachusetts moved its residents one step closer to the creation of a state orthodoxy, an Orwellian society where it would be better for a citizen not to speak at all, rather than run the risk of being punished for stuttering.

The trial court found that the Veterans' St. Patrick's Day/ Evacuation Day Parade contained a myriad of themes, values and messages, including patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes. *Id.* The trial court pointed out that some of the messages expressed in the Parade contradict those espoused by other participants. In making these content-based findings, the trial court not only evaluated the worthiness of the Parade's content, and misstated the nature of participation, but also mischaracterized the motives behind corporate sponsors, which were actively solicited by the Veterans. (See e.g., Tr. 350-51.) For example, the trial court pointed to the fact that both Gillette, a nonunion company, and the AFL-CIO participated in the parade. (Pet. for Cert. at B24.) This alleged inconsistency is somewhat strained since Gillette's involvement was limited to its sponsorship of the South Boston Against Drugs (SOBAD) float. (J.A. A88-A89.)

Because of the stated "lack of selectivity in choosing participants and failure to circumscribe the marchers' message," the trial court held that there was no specific expressive purpose entitling the Parade to protection under the First Amendment. (Pet. for Cert. at B25.) The Supreme Judicial Court affirmed, 418 Mass. at 249, 636 N.E.2d at 1299, citing *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

The Supreme Judicial Court cited *Clark* as standing for the proposition: "In order to rely on the protections of the First Amendment for speech or expressive association, the defendants initially had to demonstrate that the parade truly was an exercise of those First Amendment rights. This, the judge found, they did not do." *Irish-American Gay*, 418 Mass. at 250, 636 N.E.2d at 1299 (citations omitted). *Clark* did not

stand for this proposition. When this Court in *Clark* stated, "it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies," it was referring to questionably expressive activities such as camping and sleeping, which were proscribed, as opposed to clearly expressive activity such as a parade. 468 U.S. at 295-97. Marching and parading "if peaceful and orderly falls well within the sphere of conduct protected by the First Amendment." *Gregory* v. *City of Chicago*, 394 U.S. 111, 112 (1969). In *Clark* the issue was whether a rule prohibiting sleeping and camping, in an area of the park where such conduct was prohibited, impermissibly infringed on the message of the demonstrators who asserted that sleeping and camping overnight were integral to their speech. This Court found the regulation "clearly [a limitation] on the manner in which the demonstration could be carried out." 468 U.S. at 294. (emphasis added). Nowhere in *Clark* did this Court seek to determine whether the organizers of the demonstration shared common views, or whether the participants were close personal friends, or mere interested strangers. Yet, this is what the Massachusetts courts did.[8]

In a private parade, it is the sponsors who have the right to determine the message and content, including what is not in harmony with their own message or theme. "The manner and means by which the message is conveyed is also a matter of constitutionally protected free speech." *Dinkins*, 814 F. Supp. at 367; *Meyer* v. *Grant*, 486 U.S. at 424; *Cohen* v. *California*, 403 U.S. 15 (1971). Thus, the make-up of the parade, the gravity or the frivolity of its expression, the diversity of the participants, the messages, the parade's focus or lack of focus are all aspects of a constitutionally protected right to speak as one likes. If the Supreme Judicial Court's decision stands, judges would be empowered to determine whether expressive activities are sufficiently "focused," "proper," or "inclusive"

[8] The Massachusetts courts also cited *United States* v. *O'Brien*, 391 U.S. 367 (1968), which involved conduct which was specifically proscribed by federal law. Even in *O'Brien*, this Court assumed that the communicative element of burning a draft registration card was protected expression, whereas the Massachusetts courts held that the Veterans' Parade was neither speech nor expressive conduct. *Irish-American Gay*, 418 Mass. at 249, 636 N.E.2d at 1299.

to merit First Amendment protection. Such a content-based examination is impermissible, *see Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. at 536, and will inevitably lead to self-imposed censorship. *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988); *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 554 (1975), citing *Cantwell* v. *Connecticut*, 310 U.S. 296, 305 (1940).

The trial court's view that any parade with a variety of messages cannot acquire the protection of the First Amendment creates a dangerous new precedent for reviewing traditional First Amendment activities. The trial court's analysis, affirmed by the Massachusetts Supreme Judicial Court, would limit constitutional protection to monothematic parades, such as Pro-Life, Anti-Nuclear and Gay Rights. It would remove protection from groups like the Veterans seeking to celebrate their various traditional values.[10]

### B. *Appellate Review of Cases Involving First Amendment Claims Requires Careful Scrutiny of the Record as a Whole, and Not Deference to Lower Courts.*

The trial court found that the Veterans' parade lacked a specific expressive purpose and thus was not entitled to protection under the First Amendment to the United States Constitution. (Pet. for Cert. at B25.) In its analysis of the Veterans' First Amendment claims on appeal, the Supreme Judicial Court deferred to the trial court's findings of fact insofar as they were not clearly erroneous. *Irish-American Gay*, 418 Mass. at 242, 248, 250, 636 N.E.2d at 1295, 1298, 1299. The Supreme Judicial Court's application of this standard ignores this Court's mandate that in cases raising First Amendment issues, "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that

[10] Ironically, only when the veterans adopted a protest theme for their 1995 Parade did the federal court in Boston allow them to control the content of their Parade as an exercise of their First Amendment right of expression. *South Boston Allied War Veterans Council* v. *City of Boston*, No. 94-11402-MLW (January 17, 1995)(D. Mass.) But why should it be necessary to have a political demonstration in order to benefit from the First Amendment? The great irony, of course, is that with the goal of being "inclusive," the courts have fostered protest and divisiveness.

'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 499 (1984) quoting *New York Times* v. *Sullivan*, 376 U.S. 254, 284-86 (1964); *see also Edwards* v. *South Carolina*, 372 U.S. 227, 235 (1963); *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946).

No independent review of the record such as required by *New York Times* or *Bose* was undertaken by the Supreme Judicial Court. After a recitation of the facts found by the trial court, including the finding that "it is impossible to discern any specific expressive purpose entitling the parade to protection under the First Amendment," 418 Mass at 249, 636 N.E.2d at 1299, the Supreme Judicial Court affirmed as follows: "[t]he defendants failed to demonstrate and, on our review of the record, we could not conclude that the findings of the judge were clearly erroneous." *Id.* at 250, 636 N.E.2d at 1299.

Rather than conduct an "independent constitutional judgment on the facts of case as to whether the material involved is constitutionally protected," *Jacobellis* v. *Ohio*, 378 U.S. 184, 190 (1964), the Supreme Judicial Court refused to go beyond the lower court's findings on the First Amendment issue. Although the Supreme Judicial Court did not make the independent review required by the Constitution, this Court should conduct its own review of the record, rather than remand to the Supreme Judicial Court. *Bose Corp.* v. *Consumers Union of the United States*, 466 U.S. 485, 499 (1984).

In the absence of a ruling from this Court that parades organized by a private sponsor are categorically expressive in nature, courts across this nation will have to examine every parade to determine which is and which is not expressive enough to be entitled to constitutional protection. The constitution would mandate such an examination, *see Jacobellis* v. *Ohio*, 378 U.S. 184, 187-188 (1964), because expressive activity requires an individualized, fact-specific inquiry, *see Roth* v. *United States*, 354 U.S. 476, 496-97 (1957) (Harlan, J., concurring in part and dissenting in part) ("Every communication has an individuality and 'value' of its own . . . every [suppression] raises an individual constitutional problem.")

C. *The Veterans Cannot Be Forced to Include Someone Else's Message In Their Parade and They Have a First Amendment Right to Remain Silent on the Subject of Homosexuality.*

The trial judge found:

> GLIB was formed to march in the annual St. Patrick's Day-Evacuation Day Parade held in South Boston. GLIB's purposes are to express its members' pride in their dual identities as Irish or Irish-American persons who are also homosexual or bisexual, to demonstrate to the Irish-American community and to the gay, lesbian, and bisexual community the diversity within those respective communities, and to show support for the Irish-American homosexual and bisexual men and women in New York City who were seeking to participate in that city's St. Patrick's Day Parade.

*Irish-American Gay*, 418 Mass. 238, 241-42, 636 N.E.2d at 1295.

The Commonwealth of Massachusetts then ordered the Veterans to allow GLIB to march in their parade "in the same manner and under the same terms and conditions applicable to all other participants in the parade." (Pet. for Cert. at B29.) This meant, of course, that the Veterans were ordered to allow GLIB to march under its own banner. (Ex. 113; Tr. 482.) Simply carrying a banner which identified their group would be enough to convey GLIB's message to the parade viewers. *See U.S.* v. *Grace*, 461 U.S. 171, 176 (1983).

It is difficult to imagine anyone of sufficient age and intellect who would not understand the message GLIB sought to convey. As the trial court found, GLIB clearly had an expressive purpose which they intended to communicate through their participation in the parade. Indeed, as the photo from the Boston Globe indicates, GLIB was successful in using the Veterans' Parade to promulgate its message. (Ex. 113; Tr. 482.) The

Parade, instead of being a source of pride and accomplishment to the Veterans, became a source of anger and embarrassment.

Throughout the years this Court has consistently upheld a private party's First Amendment right to reject compelled expression. *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943) (invalidating compulsory flag salute statute); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (invalidating a statute forcing newspapers to print candidate's replies to editorials, as an impermissible burden on "editorial control and judgment"); *Wooley* v. *Maynard*, 430 U.S. 705 (1977) (invalidating penalty for refusal to display "Live Free or Die" motto on license plate); *Pacific Gas & Elec. Co.* v. *Public Utilities Comm'n*, 475 U.S. 1 (1986) (plurality opinion) (invalidating forced inclusion of consumer group's newsletter in utility's mailings to customers). These rulings are based on the premise that freedom of speech "necessarily compris[es] the decision both what to say and what not to say." *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 797 (1988). This Court has "presume[d] that speakers, not the government, know best both what they want to say and how to say it. . . . To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak. . . ." *Id.* at 791.

The government of Massachusetts, in its desire to achieve diversity, may not compel the Veterans to endorse a "gay pride" message, a message that is not their own. The Veterans have a First Amendment right "to refuse to foster . . . an idea they find morally objectionable." *Wooley*, 430 U.S. at 715. By requiring the inclusion of GLIB's message in the Veterans' Parade over the objection of the Veterans Council, the courts of Massachusetts are "[m]andating speech [the petitioners] would not otherwise make" and are "necessarily alter[ing] the content of the speech." *Riley*, 487 U.S. at 782.

"[R]egardless of whether the parade has one message, ten messages, or no message at all, if GLIB's particular message is not in the parade, it cannot constitutionally be forced on the Veterans' Council." *Irish-American Gay*, 418 Mass. at 257, 636 N.E.2d at 1303 (Nolan, J., dissenting); *Gay Veterans Assoc.* v. *American Legion*, 621 F.Supp. 1510 (S.D.N.Y.

1985); *Sanders* v. *United States*, 518 F.Supp. 728 (D.D.C. 1981), *aff'd. without opinion*, 679 F.2d 262 (D.C. Cir. 1982); (A physical intrusion into another event for the purpose of interjecting one's own convictions or beliefs is by definition an interference, regardless of how insubstantial or insignificant it might appear.); *Redgrave* v. *Boston Symphony Orchestra*, 855 F.2d 888, 906 (1st Cir. 1988), *cert. denied*, 488 U.S. 1043 (1988) ("We have been unable to find any case, involving the arts or otherwise, in which a state has been allowed to compel expression.") *Cf. Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972) ("[T]wo parades cannot march on the same street simultaneously, and government may allow only one.")

The Supreme Judicial Court failed to acknowledge the significance of *Wooley* as it relates to the present case. The Supreme Judicial Court's entire analysis was relegated to a mere four sentences in a footnote. It reasoned that since "[t]he private automobile of a New Hampshire resident could not possibly be characterized as a public accommodation," reliance on *Wooley* was improper because the Parade was found to be such a public accommodation. *Irish-American Gay*, 418 Mass. at 250 n.19, 636 N.E.2d at 1299-1300 n.19. Under this analysis owners of restaurants, taverns, supermarkets, or of any area found to be a place of public accommodation, could be forced to place signs proclaiming "Live Free or Die" in full view of their patrons. This would clearly violate the protections of the First Amendment. "[W]here the state's interest is to disseminate an ideology . . . such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such a message." *Wooley*, 430 U.S. at 717.

Although the state's concern for an end to discrimination in places of public accommodation is a valid interest, under these facts it cannot abridge the Veterans' secured right of freedom of speech. Here, the method by which the state seeks to implement its interests does not stop at prohibiting discrimination based upon sexual orientation or at securing admission to a public place. Instead, it oversteps that interest and then attempts to mandate dissemination of an ideological message supported by those it seeks to protect.

The Veterans were willing to allow any homosexual or bisexual person to march in the parade, but not under a banner expressing a homosexual/bisexual message. They sought to deny GLIB the opportunity of using the St. Patrick's Day/Evacuation Day Parade as an instrument to convey its "gay pride" message and its support for ILGO in New York and thus hijack the parade for its own expressive purposes.

The burden on the Veterans' freedom of expression was compounded given the public context in which their Parade is held. *See Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991) ("The burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context.")

Most significantly, the Supreme Judicial Court accepted the trial judge's findings that GLIB was being excluded "because of its values and its message, i.e., its members' sexual orientation". (Pet. for Cert. at B4 n.5.) In the words of the dissent, "overwhelming evidence exists throughout the record which indicates that GLIB was excluded because of its message, and not because of its members' sexual preference." *Irish-American Gay*, 418 Mass. at 260, 636 N.E.2d at 1304 (Nolan, J., dissenting).

Indeed, GLIB's Amended Complaint alleges that Defendants [the Veterans and the City] "refused to allow them to march in the 1993 Parade because of Plaintiffs' sexual orientation and *because of the content of their expression*." (J.A. A11) (emphasis added). As counsel for GLIB said in his opening statement at trial, "We will also show that the thrust of the action by the Veterans and the city is not to make a determination of GLIB as an organization or to criticize GLIB. The thrust of this is to preclude GLIB's message from being heard either in Boston or elsewhere." (Tr. 26-27.)

In his dissent Justice Nolan noted:

> There is no evidence in the record that the Veterans Council ever inquired into the sexual preference of any person intending to march in the parade, including the members of GLIB; there is no evidence that the Veterans Council ever excluded any homosexual or bisexual not a member of GLIB; the judge found

> that not all members of GLIB are homosexual or bisexual; there is evidence in the record that the Veterans Council would let the members of GLIB march without a banner identifying the group.

418 Mass. at 260 n.4, 636 N.E.2d at 1304 n.4 (Nolan, J., dissenting).

Simply put, the Supreme Judicial Court has failed to differentiate GLIB's message from its members. The Massachusetts courts, in their efforts to achieve "inclusiveness" and "diversity," have ruled that disagreement with a person's message is tantamount to discrimination and may be enjoined. Parade Adjutant Hurley testified, on the contrary, that "the message that we're trying to put out there is the Allied War Veterans Council and John 'Wacko' Hurley have no — none whatsoever — feelings of any nature against the gay/lesbian, male/female, whatever." (J.A. A104-A105.) The Veterans have the right to remain silent on the subject of homosexuality, and cannot be forced by the government to make statements either for or against it.

The trial judge based his findings on what he perceived to be "inconsistent and changing explanations for excluding GLIB" which he found were merely a pretext for exclusion based upon sexual orientation. *Irish-American Gay*, 418 Mass. at 242 n.8, 636 N.E.2d at 1295 n.8. "This is clear error, and may have led to a baseless finding that the Veterans Council discriminated on the basis of GLIB's members sexual preference. . . . It is important to note that each of the reasons for excluding GLIB proffered by the Veterans Council is not discriminatory." *Id.* at 260 & n.5, 636 N.E.2d at 1304-05 & n.5. (Nolan, J., dissenting). GLIB was excluded on their initial application due to safety concerns and insufficient information about the organization. (Ex. 72; Tr. 176.)

The Veterans were not alone in its concern for safety. The Veterans' concerns were validated by the police presence which enveloped GLIB as they made their way along the parade route. (Ex. 84.) Rather than being merely pretextual in nature, the Veterans' public safety concerns were responsible and pru-

dent given the enormous burden of organizing and running a parade of such magnitude. When asked by Chief Marshal Lyons if Barbra Kay, a founding member of GLIB, could guarantee that GLIB would not create a disturbance in the parade, Lyons noted: "She looked straight at me and she said, 'I cannot, but I will guarantee you that I would not do anything.'" (Tr. 261-62.)

GLIB's application to march in the 1993 parade was rejected based on the Veterans' decision to exclude groups with sexual themes as a way to express their religious and social values.[11] Their decision was not to allow some sexual themes while excluding others, although they certainly had that right under the First Amendment. The Veterans chose to exclude any and all sexual themes regardless of the message conveyed. They demonstrated their sincerity by excluding a truck carrying anti-homosexual signs from the Parade (J.A. A79), but strangely the Supreme Judicial Court observed: "Assuming this to be true, we perceive no legal relevance of this fact to the findings of the judge or to the conclusion we reach." *Irish-American Gay*, 418 Mass. at 244 n.10, 636 N.E.2d at 1296 n.10.

Perhaps the most troubling conclusion of the trial court was its notion that "[e]xcluding all sexual themes . . . contravenes the First Amendment's prohibition on content-based restrictions" and "is a form of discrimination." (Pet. for Cert. at B4 n.6.) Such a pronouncement is clearly "a flagrantly erroneous statement of law."[12] 418 Mass. at 260, 636 N.E.2d at 1305

[11] The Veterans' attorney Mr. Darling wrote to GLIB's attorney at the time as follows: "The vote that was recently taken by my client to not permit any group with any sexual themes to march was merely a formalization of the fact that my client has a traditional parade expressing its religious and social values." (J.A. A49; Tr. 176.)

[12] The trial court based its unique interpretation of First Amendment doctrine on *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530 (1980) and *Loving* v. *Virginia*, 388 U.S. 1 (1967). In *Consolidated Edison* the *state* Public Service Commission prohibited the utility from placing inserts in its monthly bills which dealt with subject matter proscribed by the Commission (emphasis added). This Court stated, "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison*, 447 U.S. at 537. In relying on this language, the trial court failed to take into account the very next sentence which makes it quite clear that "*government* has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (emphasis added). Nothing in *Consolidated Edison* suggests that *private parties* cannot control the content of their own speech.

(Nolan, J., dissenting). If this was indeed the law under the First Amendment, a group disfavored by a parade sponsor would merely need to couch its message in sexual terms to be admitted into the parade. It takes little imagination to foresee all manner of groups espousing sexual messages seeking inclusion into a parade. The Veterans had rejected the Ku Klux Klan, who had applied to march in the parade. (Ex. 54; Tr. 263, 323-24.) If a group wanted to march that styled itself "White Heterosexual Irish Males" (WHIM) the Veterans would be required to accept them, under the Supreme Judicial Court's precedent. It is no rhetorical exaggeration to call this the beginning of a "parade of horribles."

In *New York County Board of Ancient Order of Hibernians* v. *Dinkins*, 814 F.Supp. 358, 366 (S.D.N.Y. 1993), the court concluded that the application of a public accommodation statute which required a gay and lesbian group (ILGO) to be included in the New York City St. Patrick's Day Parade violated the parade sponsors' First Amendment rights. The court stated that "the message intended to be conveyed by a parade sponsored by a private organization is to be determined by the parade sponsor and not by the state or city," and that "[the] manner and means by which the message is conveyed is also a matter of constitutionally protected free speech." *Id.* at 367. Here, as in *Dinkins*, "the Parade sponsors have made it abundantly clear that they are unwilling to accept [GLIB] as a separate contingent in the Parade," *id.*, but have been ordered to allow GLIB to participate. The *Dinkins* court stated: "[B]y forcing the inclusion of ILGO in the parade, the Commission sought to dictate how the parade sponsors would express their thoughts. Such activity (telling citizens what they must think

(*footnote 12 cont'd*) In *Loving*, this Court held that equal application of state miscegenation statutes was racial discrimination. Leaving aside the fact that the case lacked a First Amendment claim, once again it was a governmental regulation that was invalidated.

That the trial court would fail to appreciate the lack of state action as it relates to the Veterans Council is puzzling in light of its analysis precluding liability against the City of Boston. In that part of the opinion the court understood that "the conduct of private parties is beyond the Constitution's scope." (Pet. for Cert. B22.) Given that "[t]he judge found no state action here; certainly private parties may exclude any topic or theme they want from their expression." *Irish-American Gay*, 418 Mass. at 260-61, 636 N.E.2d at 1305 (Nolan, J. dissenting).

and how they must express themselves) is something one would expect from the 'Thought Police' described by George Orwell." 814 F. Supp. at 369.

The Supreme Judicial Court has failed to take into account the Veterans Council's "right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." *Pacific Gas & Elec. Co.*, 475 U.S. 1, (1986), quoting *Buckley* v. *Valeo*, 424 U.S. 1, 49 and n.55 (1976). This Court's previous concern that government enforced access would ultimately limit "the free flow of information and ideas that the First Amendment seeks to promote," *Pacific Gas & Elec. Co.*, 475 U.S. at 14, was prophetic.

This Court has long held, "If there is any star in our constitutional constellation, it is that no official high or petty can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). The Veterans held this conviction so deeply that in 1994 they cancelled their own Parade rather than succumb to government dictate.

D. *The Constitution Protects the Veterans' Right to Associate for Expressive Purposes.*

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

A. de Tocqueville, 1 *Democracy in America*, 191 (Francis Bowen ed. 1990).

An association, de Tocqueville explained, "consists simply in the public assent which a number of individuals give to

certain doctrines and in the engagement which they contract to promote in a certain manner the spread of those doctrines." *Id.* at 192. Although the right of association was imported from England, he noted, "the exercise of this privilege is now incorporated with the manners and customs of the people. . . [T]he liberty of association has become a necessary guarantee against the tyranny of the majority." *Id.* at 195.

Although the Constitution does not speak plainly of a right to associate for expressive purposes, this Court has recognized that it protects such a freedom for the purpose of engaging in expressive activities protected by the First Amendment. Today, this Court faces the task of further defining how much of a burden the state may impose on an association's expression. *See NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.")

1. The Veterans' Council is a Membership Organization and The Parade is Their Expression.

The Veterans have a right to associate for the purposes of organizing, planning, and creating their Parade. It is undisputed that the South Boston Allied War Veterans' Council itself is an expressive association engaged in the organization and running of the Parade.

The Veterans' Council is made up only of select members from associated Veterans' groups. (Tr. 371-72.) Men and women aspiring to be nominated to the Council must first join an affiliated Veterans' group in South Boston, then must work their way up through the ranks of the local affiliates before being appointed or elected to the Council.

GLIB did not seek membership on the Veterans' Council. It is only through membership on the Veterans' Council that individuals may seek to affect the Council's speech. GLIB sought to march with a banner in the Veterans' Council's Parade. (Ex. 113.)

As previously discussed, the Parade is the Veterans' speech. Participants do not determine who will march in the Parade, or where in the line of march they will appear. The Veterans do. Bands and other groups are paid to participate. Parade officials Lyons testified at trial to the many hours' work that it takes to organize a parade. (Tr. 244, 245.) Intuitively, a parade with 10,000 marchers requires an enormous expenditure of time and effort to plan and organize.

Justice Brennan acknowledged in his majority opinion in *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984), that the Court had "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends", and noted that an "individual's freedom to speak . . . could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Id.* The Veterans' Council repeatedly asserted the right to conduct a parade that celebrated their political, social, religious and cultural values. (J.A. A49; A72-A74.)

In *Roberts* this Court noted that "the Minnesota Act does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria." It further noted that the Jaycees did not "contend that the Act has been applied in this case for the purpose of hampering the organization's ability to express its views." 468 U.S. at 623-24. Only then did this Court go on to find that "even if enforcement of the Act causes some incidental abridgment to the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the state's legitimate purposes." *Id.* at 628. It should be emphasized that the Jaycees organization itself did not claim that their expression would be materially affected by the exclusion of women in the Jaycees organization. By incidental infringement the Court was not referring to the adoption of antithetical messages in the Jaycees'

speech. "There is no basis in the record for concluding that the admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." *Id.* at 627. But this is precisely what the forced inclusion of GLIB in the Veterans' parade does — it inhibits the Veterans' ability to express its preferred religious and social values. It goes beyond inhibiting; it directly alters the message which the Veterans send down the streets in their Parade. Furthermore, in 1994 the Veterans cancelled their Parade rather than be forced to include GLIB's message. This is not an incidental infringement of speech under any test. It is utter destruction of speech.

Justice O'Connor, in her *Roberts* concurrence, emphasized "an association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members. Protection of the message itself is judged by the same standards as protection of speech by an individual. . . ." *Id.* at 633. "[A] ban of specific group voices on public affairs violates the most basic guarantee of the First Amendment — that citizens, not the government, control the content of public discussion." *Id.* at 632-34. Finding that the Jaycees were primarily engaged in commercial — rather than expressive — activity, she concurred in the judgment, but said the First Amendment claim failed as a threshold matter because the organization's main goals of training its members in business and promoting the art of solicitation and management were unrelated to expression.

A parade, as a form of speech, falls well outside any standards which would apply to the membership organization, regardless of which threshold standard is used — the *Roberts* majority or the concurrence. The Parade, as the Veterans' expression, is, by the majority standard, "plainly implicated" in the Veterans' pursuit of "a wide variety of . . . social, . . . religious, and cultural ends." 468 U.S. at 622. The Veterans in their Parade are, by the concurrence standard, "predominantly engaged in protected expression." *Id.* at 632-34.

Unlike the Jaycees, the Veterans have no commercial or business purpose. Speech is far from incidental to the Veterans'

purpose in running a parade. The principal expressive activity of the Veterans' Council is the planning, organizing, and execution of their annual Parade — which is not a public free-for-all, but rather a celebration honoring Saint Patrick, patriotism, and, in the words of a parade organizer, "traditional family values." (Tr. 320.)

Nor is the Veterans' Parade a "social association." It is the Veterans' speech. Thus, the holding of *Dallas* v. *Stanglin*, 490 U.S. 19 (1989), that there is no First Amendment protection for the purpose of associating at a dance hall for recreational dancing, is inapposite. The Veterans do not claim any right of social association with parade participants, but assert, rather, the right to plan and organize their expressive activity, their Parade. Organizing a religious, patriotic, and cultural parade is more akin to the concededly protected activity of producing and directing a play than the unprotected activity of social dancing. *See* fn. 5, *supra*.

When the trial court and the Supreme Judicial Court applied membership cases to the parade, e.g., *Concord Rod & Gun Club* v. *Massachusetts Comm'n Against Discrimination*, 402 Mass. 716, 720, 524 N.E. 2d 1364 (1988), *Roberts* v. *Jaycees*, 468 U.S. 609 (1984), the courts improperly drew the inference that the parade itself was a membership organization. It is not. It is the Veterans' expressive activity — their speech. In this case, the Veterans argued repeatedly that their parade was their speech, and that forcing them to carry a message they found objectionable was unconstitutional.

2. The First Amendment Protects The Right of an Expressive Association to Control the Content of Its Own Speech.

An expressive association may not be forced to support ideological causes with which it disagrees. *Roberts*, 464 U.S. 609 (1984); cf. *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977); *Keller* v. *State Bar of California*, 496 U.S. 1 (1990).

Although the ability under certain circumstances to exclude unwanted members from quasi-commercial or business clubs has been circumscribed in the face of challenges such as *Roberts*, where the state had a compelling interest in banning discrimination in places of public accommodation, the principle is still that the right to expressive association encompasses the right to exclude unwanted and antithetical messages from the association's expression.

3. The State's Interest in Preventing Discrimination In Places of Public Accommodation Is Not Implicated by the Veterans' Parade.

A state's compelling interest in eradicating race and gender discrimination in places of public accommodation may, under certain circumstances, outweigh a club's denial of membership to women and minorities, where business or commercial goals are involved. *See, e.g., New York State Club Ass'n* v. *New York City*, 487 U.S. 1 (1988); *Rotary International* v. *Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts* v. *Jaycees*, 464 U.S. 609 (1984). But the Veterans' Parade is their expression, rather than a business or commercial activity.

The Massachusetts courts unconstitutionally applied the state's interest in prohibiting discrimination in places of public accommodation to a membership organization's expression. GLIB members' sexual orientation is different from their proposed expression in the Veterans' Parade. The Veterans seek to exclude the latter. The record makes clear that GLIB was formed for the purpose of making a statement in the St. Patrick's Day Parade. (Pet. for Cert. at B3.) People who supported that cause could join with them under their banner, irrespective of whether they were Irish or homosexual. (Tr. 98.) Further, as Justice Nolan noted in his dissent, "overwhelming evidence exists throughout the record which indicates that GLIB was excluded because of its message, and not because of its members' sexual preference." *Irish-American Gay*, 418 Mass. at 260 n.4, 636 N.E.2d at 1304 n.4 (Nolan, Jr., dissenting).

The compelling state interest behind the Massachusetts public accommodation statute is not burdened by the exclusion of

GLIB and its banner from the Veterans' private Parade. It is not even implicated.

4. Even if the State's Anti-Discrimination Interest Were Implicated, It Cannot Stand Against the Veterans' First Amendment Right to Create Its Own Voice.

Any interest of GLIB in marching in the Veterans' Parade is trumped by the Veterans' First Amendment freedom of speech. GLIB's members are free to march in the parade as individuals in another contingent, like the rest of the participants who, whether homosexual or heterosexual, are free to march but not to promote their sexual and political agenda via the Veterans' Parade.

If they wish to proclaim their homosexuality and Irish heritage as a group, they can hold their own parade (and, if they wish, exclude the Veterans and any other group with a message of religious or moral values with which *they* disagree).

On the other hand, the Veterans' message is distorted if GLIB's message is forced into their Parade. *See Pacific Gas & Elec. Co.*, 475 U.S. at 12 ("[F]orced associations that burden speech are impermissible.") In fact, the Veterans' expression is so burdened that its First Amendment right of expressive association no longer has meaning: either their expression is so distorted by GLIB's inclusion that the traditional message is unrecognizable, (*see*, e.g., Ex. 113), or else their expression is completely obliterated because the Veterans will simply cancel the parade and their message will never be heard.

## II. The Veterans' Refusal to Include the Gay, Lesbian and Bisexual Message Within the Parade Cannot Be Declared Unlawful Discrimination Under the Massachusetts Public Accommodation Laws Because Those Laws are Unconstitutionally Overbroad.

The Veterans' refusal to include the gay, lesbian and bisexual message cannot be declared unlawful under the Massachusetts public accommodation statute, because the statute is uncon-

stitutionally overbroad in violation of the First and Fourteenth Amendments. As authoritatively interpreted by the Supreme Judicial Court, these laws burden nearly all public First Amendment activity with government-specified inclusiveness requirements, criminalizing a substantial amount of protected speech.

The Massachusetts public accommodation law provides both civil and criminal penalties for, *inter alia*, "whoever makes any distinction or restriction on account of" specified categories such as race and sex "relative to . . . the admission of any person to or his treatment in any place of public accommodation." Mass. Gen. L. ch. 272, § 98 (1994). The term "place of public accommodation" is defined to include virtually all places open to the public except churches. ch. 272, § 92A.[11]

The offenses prohibited under Section 98 are not limited to discrimination; they include as well any "distinction" relative to "treatment" of persons. They are not limited to actions of owners or proprietors of public places; they apply to "[w]hoever" makes a distinction on account of specified categories in the treatment of any person in a public place. Thus, any speech in any form by any person in a public place is subject to regulation within the literal scope of Section 98. Speech that makes a distinction on the basis of specified criteria in the treatment of any person is prohibited from public places; speech that makes no distinction, or that distinguishes on the basis of non-specified categories (for example, age) is not so prohibited. *R.A.V.* v. *City of St. Paul*, 112 S.Ct. 2538, 2549 (1992) ("Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.")

The Massachusetts courts have not substantively limited the unconstitutional reach of Section 98. Massachusetts cases in-

[11] The Superior Court held and the Supreme Judicial Court affirmed that "the Veterans' exclusion of GLIB from the [parade] violates G.L. c. 272, §§ 92A and 98." Neither the Superior Court nor the Supreme Judicial Court found that the Veterans engaged in any speech or activity violative of § 92A. Neither court quoted § 92A's operative provision, which prohibits, *inter alia*, discrimination through advertising and other modes of speech by proprietors of public places. Although the Supreme Judicial Court also stated that "[b]y their terms, G.L. c. 272, §§ 92A and 98 facially do not reach a speech or expression or association protected by the First Amendment," section 92A by its terms regulates the content of such pristine modes of speech as pamphlets, signs, notices and books.

terpeting Section 98 provide no meaningful guidance as to the limits of the words "distinction" or "treatment." The one Supreme Judicial Court case suggesting (in dicta) a limiting interpretation of these terms does so in a vague and meaningless manner, stating that "[a] place of public accommodation . . . has an obligation to treat each member of the public equally, *except for good cause*." *Smith* v. *Suburban Restaurants, Inc.*, 374 Mass. 528, 530, 373 N.E.2d 215, 218 (1978) (emphasis added).

Indeed, the decision of the Supreme Judicial Court in this case has only broadened the unconstitutional sweep of the public accommodation laws. As directed above, the Supreme Judicial Court has extended Section 98 to cover inclusion of messages intended to be conveyed by members of specified groups. "This construction fixes the meaning of the statute for this case. The interpretation by the [state's highest court] puts the words into the statute as definitely as if it had been so amended by the legislature." *Winters* v. *New York*, 333 U.S. 507, 514 (1948).

The public accommodation laws do not distinguish in any way between protected speech and inexpressive activities. Now that the Supreme Judicial Court has interpreted these laws to apply to parades,[14] these laws clearly encompass at least those First Amendment activities which are in any sense public. The Supreme Judicial Court's broad standard for determining what activities are public is thus troubling. In the case at bar, the Supreme Judicial Court simply noted in a footnote that "virtu-

[14] The Massachusetts courts' finding that a parade — a clearly expressive activity — is "a place" arguably adds an unreasonable, unexpected and unusual meaning to the plain meaning of the word "place." See *Conner* v. *Sakai*, 15 F.3d 1463, 1468-69 (9th Cir. 1993) (Unusual interpretations of plain language may violate Due Process requirements.) Moreover, such a finding flies in the face of the Massachusetts courts' prior limiting constructions of the word "place." *U.S. Jaycees* v. *Massachusetts Comm'n Against Discrimination*, 391 Mass. 594, 601, 463 N.E.2d 1151, 1155 (1984). ("'Place' is not a technical word. It has no narrowly defined, special meaning aside from its common definition . . . In its primary and general sense [place] means locality, situation, or site, and is also used to designate an occupied situation or building") (citing Black's Law Dictionary 1034 (5th ed.)). *See Welsh* v. *Boy Scouts of America*, 993 F.2d 1267, 1271-72 & n.4 (7th Cir. 1993) (Massachusetts public accommodation law reaches places, not events.)

ally any member or group drawn from the public may apply or pay to enter the parade." Since few if any rallies, demonstrations, parades, marches or protests occurring on public streets exhibit greater selectivity than the Veterans' parade, nearly all are regulated as to their participants and their messages by the Massachusetts public accommodation law. Those making any distinction relative to the treatment of specified categories of persons will be very effectively chilled by these laws.

The unconstitutionally broad sweep of the public accommodation laws is illustrated quite clearly by the discussion of these laws in the Supreme Judicial Court's holding in *United States Jaycees* v. *Massachusetts Comm'n Against Discrimination*, 391 Mass. 594, 463 N.E.2d 1151 (1984). There, the Supreme Judicial Court held that "[W]hile the U.S. Jaycees does not constitute a place of public accommodation, the organization may not discriminate on the basis of sex in its admission to, or treatment of any person in a place of public accommodation." *Id.* at 608.

Considerably more troubling is the fact that the statute makes no distinction between public and private activities; it distinguishes only between private and public places. By its terms, Section 98 encompasses purely private activities occurring in a public place, since it states that "whoever" makes a distinction relative to a specified category in the treatment of any person in a public place "shall be punished." Nothing in Massachusetts case law suggests that the Massachusetts courts would not apply Section 98 to private activities. In the case at bar, the Supreme Judicial Court initially appeared to hold that the parade was subject to the public accommodation statute simply because:

> [t]he parade occurs on the public streets of South Boston. Nothing in § 92A or any other statute suggests that a boardwalk or other public highway loses its character as a place of public accommodation, resort or amusement, which it gains by operation of that statute, merely because a parade is conducted there.

The Supreme Judicial Court added (in a footnote) an observation that the parade itself was public. The full text of the footnote, however, demonstrates that a lack of public nature would not have been dispositive:

> The defendants argue that, by operation of law, issuance of a parade permit closes the streets of the parade route to the public. We do not need to decide whether that is true. The findings of the judge suggest that virtually any member or group drawn from the public may apply or pay to enter the parade.

418 Mass. at 248 n.13, 636 N.E.2d at 1298 n.13. If the Supreme Judicial Court had found that the parade was an entirely private activity, it would next have considered whether the streets remained a "place of public accommodation" during the parade. The controlling fact in application of section 98 is not who or what type of group or activity makes an impermissible distinction, but whether that distinction occurs in a place of public accommodation.[15] Thus, the plain text of the statute, which encompasses all private and and all public activities or speech, whether expressive or inexpressive, is in no way limited by the holdings of the Supreme Judicial Court in this or any other case.[16] The Supreme Judicial Court stated that it would not interpret the public accommodation laws "so that they could reach and unconstitutionally infringe on speech," but then added in a footnote, "We leave

---

[15] At least one Massachusetts court has found that a private person may have violated rights guaranteed under the Massachusetts public accommodation law. In *Commonwealth* v. *Stephens*, 25 Mass. App. Ct. 117, 123, 515 N.E.2d 606, 610 (Mass. App. Ct. 1987), which concerned a prosecution of an individual for wilful violation of the rights of another under G.L. c. 265, § 37, the appellate court upheld a jury instruction stating in part that "state law guarantees that all persons have the right to use public streets and sidewalks free from any discrimination or restriction on account of race, color or national origin (see G.L. c. 272, § 92A and § 98)."

[16] If the application of the statute is in some way limited, that limitation is by no means apparent from the case law of from the words of the statute, and the statute is thus incomprehensively vague in violation of the First and Fourteenth Amendments. See *NAACP* v. *Button*, 371 U.S. 415, 433 (1963) ("[T]he objectionable quality of vagueness and overbreath . . . [depends] upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute capable of sweeping and improper application.")

open for an appropriate case the question whether the public accommodation law permissibly could be applied to a genuine exercise of First Amendment rights." *Irish-American Gay*, 418 Mass. at 251-52, & n.21, 636 N.E.2d at 1300 & n.21. The Supreme Judicial Court's promise is not only entirely vague but also insufficient to limit the scope of these laws. As this Court has repeatedly held: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step in and say who could rightfully be detained and who should be set at large." *City of Houston* v. *Hill*, 482 U.S. 451, 466 (1987), *citing United States* v. *Reese*, 92 U.S. 214, 221 (1876).

As a result, any individual or group in Massachusetts wishing to exercise First Amendment freedoms in a way that makes a distinction in treatment of persons based on certain government-specified criteria must do so in a church or private home, or commit a criminal act.

Under the overbreadth doctrine, a party may challenge an ordinance when it sweeps too broadly, penalizing a substantial amount of protected speech. *See Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). The Massachusetts public accommodation law regulates virtually any speech in any form by any person outside of private homes and churches, and it penalizes a substantial amount of constitutionally protected speech. The Massachusetts public accommodation law grants the government power to interfere directly in the composition and the content of constitutionally protected speech. It allows the government to impose upon citizens the obligation to promote messages those citizens oppose. It enables the government to grant a heckler's veto over protected speech to groups whose principal goal is opposition to the content of constitutionally-protected speech. The First and Fourteenth Amendments prohibit the Massachusetts courts from declaring the Veterans' Parade unlawful under a statute that is itself unconstitutionally overbroad.

As the decisions in this case demonstrate, the Massachusetts courts have their own opinions concerning the appropriateness of a message conveyed via a "pristine form of speech." The

Superior Court believes that "inclusiveness should be the hallmark" of the Veterans' Parade. The Veterans disagree. In an environment of respect for the First Amendment, the judges' opinions might be expressed in letters to a local newspaper. In Massachusetts, they are imposed by way of an injunction.

## CONCLUSION

Petitioners pray that the judgments and decisions of the lower courts be reversed and vacated.

Respectfully submitted,

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# STATUTORY APPENDIX

## A. MASSACHUSETTS GENERAL LAWS CHAPTER 272. CRIMES AGAINST CHASTITY, MORALITY, DECENCY AND GOOD ORDER

§ 92A. Advertisement, book, notice or sign relative to discrimination; definition of place of public accommodation, resort or amusement

No owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement shall, directly or indirectly, by himself or another, publish, issue, circulate, distribute or display, or cause to be published, issued, circulated, distributed or displayed, in any way, any advertisement, circular, folder, book, pamphlet, written or painted or printed notice or sign, of any kind or description, intended to discriminate against or actually discriminating against persons of any religious sect, creed, class, race, color, denomination, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, nationality, or because of
29 deafness or blindness, or any physical or mental disability, in the full enjoyment of the accommodations, advantages, facilities or privileges offered to the general public by such places of public accommodation, resort or amusement.

A place of public accommodation, resort or amusement within the meaning hereof shall be defined as and shall be deemed to include any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be (1) an inn, tavern, hotel, shelter, roadhouse, motel, trailer camp or resort for transient or permanent guests or patrons seeking housing or lodging, food, drink, entertainment, health, recreation or rest; (2) a carrier, conveyance or elevator for the transportation of persons, whether operated on land, water or in the air, and the stations, terminals and facilities appurtenant thereto; (3) a gas station, garage, retail

store or establishment, including those dispensing personal services; (4) a restaurant, bar or eating place, where food, beverages, confections or their derivatives are sold for consumption on or off the premises; (5) a rest room, barber shop, beauty parlor, bathhouse, seashore facilities or swimming pool, except such rest room, bathhouse or seashore facility as may be segregated on the basis of sex; (6) a boardwalk or other public highway; (7) an auditorium, theatre, music hall, meeting place or hall, including the common halls of buildings; (8) a place of public amusement, recreation, sport, exercise or entertainment; (9) a public library, museum or planetarium; or (10) a hospital, dispensary or clinic operating for profit; provided, however, that with regard to the prohibition on sex discrimination, this section shall not apply to any corporation or entity authorized, created or chartered by federal law for the express purpose of promoting the health, social, educational, vocational, and character development of a single sex; provided, further, that with regard to the prohibition of sex discrimination, those establishments which rent rooms on a temporary or permanent basis for the exclusive use of persons of the same sex shall not be considered places of public accommodation and shall not apply to any other part of such an establishment.

Any person who shall violate any provision of this section, or who shall aid in or incite, cause or bring about, in whole or in part, such a violation shall be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than thirty days, or both.

§ 98. Discrimination in admission to, or treatment in, place of public accommodation; punishment; forfeiture; civil right

Whoever makes any distinction, discrimination or restriction on account of race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, deafness, blindness or any physical or mental disability or ancestry relative to the admission of any person to, or his treatment in

any place of public accommodation, resort or amusement, as defined in section ninety-two A, or whoever aids or incites such distinction, discrimination or restriction, shall be punished by a fine of not more than twenty-five hundred dollars or by imprisonment for not more than one year, or both, and shall be liable to any person aggrieved thereby for such damages as are enumerated in section five of chapter one hundred and fifty-one B; provided, however, that such civil forfeiture shall be of an amount not less than three hundred dollars; but such person so aggrieved shall not recover against more than one person by reason of any one act of distinction, discrimination or restriction. All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement subject only to the conditions and limitations established by law and applicable to all persons. This right is recognized and declared to be a civil right.

## B. BOSTON TRANSPORTATION DEPARTMENT RULES AND REGULATIONS AS AMENDED THROUGH JANUARY 2, 1988 (1993)

### Article VIII

### PARADES, PROCESSIONS AND FORMATIONS

#### Section 1. Parades, Processions and Formations

No person shall take part in any parade, procession or other organized formation of persons or vehicles, other than a funeral procession or a picket line, in or upon any street, way, highway, road, or parkway under the control of the City unless the Commissioner of Transportation has granted a permit for such parade, procession, or formation. The Commissioner of Transportation shall issue such permit in all cases except where the time, place, and manner are not in conformity with the Rules set forth below, or where the permit would conflict as to time

or place with a permit previously issued. No fee shall be charged for any such permit.

1. The written request for the permit shall be filed with the Commissioner of Transportation at least seventy-two hours prior to the occurrence and should include the following:

a. The date and starting time.

b. The name, address and telephone number of the applicant and name of the organization involved.

c. The formation or assembly area and time therefor.

d. The route of the parade or motorcade and what portions of the streets traversed may be occupied by such parade or motorcade.

e. The approximate number of people and vehicles in the parade or motorcade.

2. No permit shall be issued authorizing a parade, procession, or formation under the following conditions:

a. When the sole purpose is advertising any product, goods, wares, merchandising, event, or is designed to be held for private profit.

b. When the time, route, and size will disrupt the use of any street of any public place, or material portion thereof, which is ordinarily subject to great congestion of traffic and is chiefly of a business or mercantile character, except upon those holidays or Sundays when places of business along the route proposed are closed.

c. When it is of a size or nature that requires the diversion of so great a number of police officers of the City to properly police the line of movement and the areas contiguous

thereto, that allowing the parade or motorcade would deny reasonable police protection to the City.

Special permits for occasions of extraordinary public interest, not annual or customary, or not so intended to be, may be granted by the Commissioner of Transportation for any street or public place, and for any day or hour, with the approval of a majority of the Boston Transportation Commission.

The Commissioner of Transportation shall have the authority to modify the route, time, and place of a parade to facilitate crowd control in the interest of relieving congestion and promoting public safety, provided that the applicant's right of free speech is not denied thereby.

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1994

JOHN J. HURLEY, Individually, and the SOUTH BOSTON ALLIED VETERANS COUNCIL,

*Petitioners,*

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, By and through TIMOTHY DALEY and CATHLEEN FINN, Individually and as representatives of IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON,

*Respondent.*

**On Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts**

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## QUESTION PRESENTED

Does application of the state anti-discrimination law to the Council's administration of Boston's Evacuation Day/St. Patrick's Day Parade, on the record of this case, violate the Council's First Amendment rights, when the state courts found that the state's interests underlying the statute would be served less effectively absent such application, that any infringement on the Council's First Amendment interests is incidental, and that the Parade is, essentially, "an open recreational event"?

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## OPINIONS BELOW

The opinion of the Supreme Judicial Court, *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, 418 Mass. 238, 636 N.E.2d 1293 (1994), is included in Appendix C to the Petition for Certiorari. (C1.) The opinion of the Superior Court of the Commonwealth of Massachusetts, *Irish-American Gay, Lesbian and Bisexual Group of Boston, et al. v. City of Boston, et al.*, Civil Action No. 92-1518A (December 15, 1993), is included in Appendix B to the Petition for Certiorari. (B1.)

## JURISDICTION

Respondent adopts Petitioner's jurisdictional statement.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves portions of the First and Fourteenth Amendments to the Constitution:

"Congress shall make no law . . . abridging freedom of speech . . . "

U.S. Constitution, Amendment I.

"Nor shall any state deprive any person of life, liberty, or property without due process of law . . . "

U.S. Constitution, Amendment XIV, § 1.

## STATUTE INVOLVED

The statute involved is Massachusetts General Laws, chapter 272, sections 92A and 98. These sections are set out in the Appendix to this brief. (A1.)

## STATEMENT OF THE CASE

This case turns on its facts. The relevant facts, which inform the holding on review in this Court – that the state anti-discrimination statute does apply, and constitutionally can apply, to the Parade – concern two important aspects of Massachusetts history and tradition.

One is Massachusetts' long history, dating from the civil war period, of very broad statutory anti-discrimination protection, extending to virtually every area of public life. In 1865, three years before the adoption of the Fourteenth Amendment, the Commonwealth enacted a statute providing that "no distinction, discrimination or restriction on account of color or race shall be lawful in any licensed inn, in any public place of amusement, public conveyance **or public meeting** in this commonwealth." 1865 Mass. Acts 277 (emphasis added); *see Bryant v. Rich's Grill*, 103 N.E. 925 (Mass. 1914). The Massachusetts Legislature has step by step expanded statutory protection beyond racial discrimination, as the Commonwealth's sense of the public interest has matured, and now proscribes discrimination on the basis of religion (1950 Mass. Acts 479, § 3), national origin (1963 Mass. Acts 613, § 5), sex (1971 Mass. Acts 418, § 2), deafness and blindness (1975 Mass. Acts 338, § 2), physical or mental disability (1979 Mass. Acts 595, § 2), and

sexual orientation (1989 Mass. Acts 516, § 15).[1] *See* Mass. Gen. L. ch. 272, §§ 92A, 98 (1994).[2]

It is not, and could not be, disputed that the Commonwealth's public accommodations statute, applied by the Massachusetts courts in this case, is a statute of general applicability. The statute was enacted under the Commonwealth's police power and is broadly targeted at discrimination. It is not specially aimed or targeted at speech, although on occasion it has been, as it was here, applied to conduct that is claimed to have expressive aspects.

The second facet of Massachusetts tradition involved in this case is the unique civic celebration that takes place in Boston each year on Evacuation Day, the day the British sailed away from Boston on March 17, 1776 after General Washington's first victory in the War of Independence. March 17, of course, also happens to be St. Patrick's Day. (Cert. Pet. App. at B8.)[3] The rich history

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[1] In addition to Massachusetts, five other states prohibit discrimination in public accommodations based on sexual orientation. *See* CONN. GEN. STAT. § 46a-81 (1992); MINN. STAT. ANN., §§ 363.02, 363.02(4), 363.03(3) (West Supp. 1993); N.J. STAT. ANN. § 10:5-4 (West 1993 and Supp.); VT. STAT. ANN. tit. 9, § 4502-03 (1993); WIS. STAT. § 101.22 (1991-1992). In addition, California's Unruh Act has been construed to forbid "unreasonable discrimination" in places of public accommodation. Cal. Civ. Code, § 51 (West 1994); *see Hubert v. Williams*, 133 Cal.App.3d Supp. 1, 5, 684 Cal. Rptr. 161 (1982).

[2] The statute is set out in full in Appendix A to this brief.

[3] The opinions of the Massachusetts Superior Court and the Supreme Judicial Court are found in Appendices B and C, respectively of the Petition for Certiorari.

that surrounds this celebration is spread out in the record made in the trial court. That record vividly portrays a civic holiday centered on a municipal parade, which the Council itself refers to as "*the* Parade". (Pet'r Br. at at 2) (emphasis added).

The Parade was once formally under the City of Boston's management. (Cert. Pet. App. at B8-B9.) After World War II, Mayor James Michael Curley granted a group of returning veterans, Petitioners here (hereafter "the Council") "authority to organize and conduct the Parade." (*Id.* at B9.) Whatever its titular sponsorship, the Parade has without interruption been, in fact, an open recreational event for all the people of Boston who seek to celebrate both our freedom as Americans and the many strands of Irish heritage that underlie so much of Massachusetts' modern history. Parades are not all alike, and the Boston Evacuation Day/St. Patrick's Day parade cannot be understood without attention to its provenance and history. Whatever expressive elements it is claimed to have, which the state courts addressed in detail, it is beyond dispute that the Boston Parade differs in important ways from such social protests or political events as civil rights marches, labor demonstrations, or protest marches.

### A. The Proceedings Below.

Litigation in this case began in March, 1992, when GLIB, a group of Irish-American gay men, lesbians, bisexuals and their supporters, filed a complaint in state court alleging, *inter alia*, that the City of Boston and the Council, acting under color of law, had deprived GLIB of its

First and Fourteenth Amendment rights by refusing to permit GLIB to register and march in the 1992 "City of Boston Evacuation Day Parade." (Record, Paper No. 1, Complaint, March 10, 1992.) The trial court issued a restraining order requiring GLIB's inclusion in the Evacuation Day Parade, limiting the number of marchers to 25 and imposing other conditions related to the safety of GLIB's members and also addressing the Council's fears that GLIB would be disruptive. (Record, Paper No. 3, March 11, 1992; Cert. Pet. App. at B26 n.28.) No appeal was taken, and GLIB participated in the 1992 event in an orderly fashion. (Cert. Pet. App. at B3, 26 & n.29.)

In February 1993, after GLIB's request for a registration form for the 1993 Parade was refused by the Council, GLIB filed an amended complaint (J.A. at A5 *et seq.*), repeating its 1992 allegations of deprivation of federal and state constitutional rights under color of law, and adding a count alleging that the Council, aided and abetted by the City of Boston, had unlawfully discriminated against GLIB and its members on the basis of sexual orientation in violation of Massachusetts General Laws, chapter 272, sections 92A and 98. After the hearing, on February 22, 1993, the Superior Court allowed GLIB's motion for a preliminary injunction, once again ordering GLIB's inclusion in the Parade, on essentially the same terms and conditions as in 1992. (J.A. at A2.)

In November 1993, the trial court conducted a four-day bench trial to determine whether GLIB was entitled to permanent, as opposed to preliminary, injunctive relief. In the course of trial, the trial judge heard 12 witnesses and received 113 exhibits. (Cert. Pet. App. at B2.) After hearing, the trial judge denied GLIB's claims

against the City (*Id.* at B22), but concluded that the Council had violated GLIB's right "to be free from sexual-orientation discrimination in a place of public accommodation, resort, or amusement" in violation of the Massachusetts public accommodations law. (Cert. Pet. App. at B28.) The court rejected the Council's claim that the First Amendment barred application of the state law to its conduct. (*Id.* at B25.) To remedy the violation of state law, the superior court decreed that "the defendant Veterans Council is permanently enjoined from preventing plaintiff GLIB from participating in the St. Patrick's Day/Evacuation Day Parade because of the group members' sexual orientation." (*Id.* at B28.) At GLIB's request, the court rescinded the special limiting conditions that had been imposed on GLIB by the 1992 and 1993 court orders, ordering, instead, that "the defendant Veterans Council shall allow GLIB to participate in the Parade in the same manner and under the same terms and conditions applicable to all other participants in the Parade." (*Id.* at B29.) The Supreme Judicial Court affirmed that judgment, one justice dissenting. (*Id.* at C15.)

**B. The Judgment Below.**

The trial court's judgment in GLIB's favor rested on three fact-based determinations: (1) that the Council had unlawfully discriminated against GLIB's members on the basis of their sexual orientation (Cert. Pet. App. at B4); (2) that the event described at trial, as the Council had administered it, was a place of public accommodation within the meaning of the public accommodations statute (Cert. Pet. App. at B9); and (3) that the Council was not entitled to an exemption from the anti-discrimination law

on First Amendment grounds. (Cert. Pet. App. at B4, B9, B25.) Each of these conclusions was supported by substantial evidence.[4]

### 1. The finding of sexual orientation discrimination

The Council, through John J. "Wacko" Hurley, its spokesperson, offered several ostensibly neutral explanations for excluding GLIB from the Parade: "safety reasons" (Cert. Pet. App. at B3); a decision by the Council that no groups with "sexual themes" would be permitted to march (*id.*);[5] and an unsubstantiated belief that GLIB members were associated with radical gay groups (Cert. Pet. App. at B4-5 & n.5.) Hurley also denied that he or the Council were biased against "the gay/lesbian" (J.A. at A105), or had ever "knowingly" excluded any individual

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[4] The first two of the state courts' conclusions resolved questions of state law and are not reviewable in this Court. We nevertheless set out these conclusions, and their factual underpinnings, because the solidity of these findings is related to, and supports, the state courts' analysis and ultimate conclusion that the Veterans Council could not claim an exemption from the public accommodations statute based on the first amendment. *Cf. New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) (considering the extent to which a club was truly private, and extent to which its expressive purpose was central, in determining whether degree of incursion on first amendment rights of intimate and expressive association was constitutionally permissible).

[5] This reason first surfaced in a letter written by the Council's lawyer to GLIB. (J.A. at 49.) It appears that in the mind of Mr. Hurley, the phrase "sexual themes" means self-identification as gay, lesbian or bisexual. (*See* Tr. at 328.)

from the Parade based on his or her sexual orientation. (J.A. at A102.) However, the trial judge found that Mr. Hurley "equivocated" on the stand and that the "reasons" he gave for the Council's exclusion of GLIB were "pretextual" excuses. (Cert. Pet. App. at B3-4.) In the end, the judge found as a matter of historical fact that "GLIB was excluded from the Parade on account of its members' sexual orientation, and I so find." (*Id.* at B4.)[6] The Supreme Judicial Court affirmed the trial judge's finding, noting in particular the judge's painstaking examination of the trial evidence and the judge's reliance on Mr. Hurley's "inconsistent and changing explanations for excluding GLIB." (*Id.* at C6.)

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[6] The Council, (Pet'r Br. at 24,) ignores this explicit finding and substitutes instead the trial judge's summation of *the Council*'s position that it was excluding GLIB on the basis of GLIB's values and message: "GLIB would be excluded because of its values and its message, *i.e.*, its members' sexual orientation." (Tr. of Closing Arg. at 43, 51-52 (Nov. 23, 1993); (Cert. Pet. App. at B4 n.5.)

In a similar vein, the Council states that "GLIB's Amended Complaint alleges that Defendants [the Veterans and the City] 'refused to allow them to march in the 1993 Parade because of the Plaintiffs' sexual orientation and *because of the content of their expression*." (Pet'r Br. at 24) (emphasis in original). What the Council leaves out is that GLIB, in that specific claim, was alleging that the City and the Council, as a state actor, were violating GLIB's First and Fourteenth amendment rights. (J.A. at A12.) The claim against the Council alone, upon which GLIB prevailed, was a different one – that the Council discriminated against GLIB on the basis of its sexual orientation, in violation of the state anti-discrimination laws. (J.A. at A11-12.)

### 2. The determination that the parade is a place of public accommodation

The Council contended in the courts below that the anti-discrimination statute does not apply to its conduct of the Parade because the Parade is not a place of "public accommodation . . . or amusement" within the meaning of the statute. (Cert. Pet. App. at B6.) The trial judge rejected this on the basis of abundant evidence that the Council had shown no selectivity in the admission of groups to the Parade. (*Id.* at B6.) Not only did the Council allow a diverse array of commercial, political, theatrical, charitable, religious, athletic, and other groups to march, but it generally made no inquiry into "the specific views" of participating groups. (*Id.* at B7-8.) Moreover, some groups simply showed up and marched in the Parade without submitting an application, and others marched because they made a financial contribution in lieu of filling out an application. (*Id.* at B8.)[7]

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[7] In reaching his determination that the Council did not exercise genuine selectivity, the trial judge considered that the Veterans Council had, on occasion, excluded groups from the Parade, notably the Ku Klux Klan and an anti-busing group called ROAR. The judge noted that neither of these groups was protected under the public accommodations statute. (Cert. Pet. App. at B7.) The Supreme Judicial Court recognized that the Veterans Council had excluded a few other groups as well, a Right to Life group and a truck carrying anti-homosexual signs among them. The Supreme Judicial Court found "no legal relevance of this fact to the findings of the judge or to the conclusion we reach." (*Id.* at C8 n.10.)

The trial judge also took note of the specific character of the Boston Parade as a "public celebration of long-standing." (Cert. Pet. App. at B8.) In particular, the court noted that the Parade celebrates a public holiday, as well as St. Patrick's Day. The Parade was formerly administered by the City directly, in conjunction with a citizens association. It was only in 1947 that Mayor James Michael Curley conferred on the Council, composed of veterans returning victorious from World War II, the honor of organizing and conducting the Parade. Since then, the Council has been the exclusive holder of the permit to administer the Parade. (*Id.* at B8-9; Tr. at 302.)

The Governor of the Commonwealth issues a proclamation each year recognizing the historical significance of Evacuation Day, and public schools and buildings close for the day in Suffolk County. (Cert. Pet. App. at B8, n.10.)

The Parade draws as many as 20,000 participants and up to 1,000,000 spectators (*id.* at B9), and it is "the largest New England event for Irish-Americans, their friends, and well-wishers." (*Id.*)

Based on these factual findings, and the plain meaning of the public accommodations statute,[8] as construed in prior instances, the Supreme Judicial Court affirmed the trial court's ruling that the Parade falls within the scope of the public accommodations law. (*Id.* at C11-12.)

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[8] A "place of public accommodation" includes, *inter alia*, "a boardwalk or other public highway" and a "place of public amusement, recreation, sport, exercise or entertainment . . . " Mass. Gen. L. ch. 272, § 92A(6), (8) (1994).

At the same time, the Supreme Judicial Court was careful to note that it was by no means holding that every parade is a place of public accommodation. "Rather, we base our conclusions on the unique nature of the facts found as to the parade in controversy." (*Id.* at C13-14 n.18.)

### 3. The determination that the parade is not entitled to a first amendment exemption

The Council contended at trial and on appeal in state court that the Parade "is a form of speech protected by the First Amendment via the Fourteenth Amendment, and that [the Council's] speech will be effectively diluted or distorted if they are required to include GLIB in the Parade." (Cert. Pet. App. at B23.)

Invoking this Court's precedents,[9] the trial court considered the Council's First Amendment claim, but ultimately rejected it. (*Id.* at B23-24.) Based on the factual record before him, the trial judge concluded that "it is impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment." (*Id.* at B25 (quoting *New York State Club Ass'n*, 487 U.S. at 13).)

Essentially, the judge decided that the same facts which deflated the Council's claim that the Parade was not a place of public accommodation also put to rest the Council's First Amendment claim. He found that the event consisted of

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[9] *See Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988); *Roberts v. United States Jaycees*, 468 U.S. 609, 617 (1984).

"diverse groups espousing myriad themes and values," and that the Council made no significant attempt to limit participation or circumscribe the messages of participants. To the contrary, the record established that the Council "always opted for heterogeneousness." (Cert. Pet. App. at B24-25.) On these facts, the court held that the inclusion of GLIB would not undermine any specific purpose around which the Parade was organized. (*Id.* at B25.)

Moreover, the judge held, even if there was some slight infringement on the Council's right of expressive association, the incidental infringement imposed by the public accommodations statute was permitted under this Court's cases. *See, e.g., Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987); *Roberts*, 468 U.S. at 623.

Finally, the judge noted that "[t]his is not to say that the Parade can never become a protected First Amendment activity. It simply has not been one in the past and is not one now." (Cert. Pet. App. at B25 n.27.)

After its own review of the record and the trial court's factual findings, the Supreme Judicial Court affirmed the trial judge's determination that it was impossible to discern any specific expressive purpose that would exempt the Council from compliance with the public accommodations law. (*Id.* at C13-14.) The Supreme Judicial Court recognized that the trial court had reached its conclusions in light of extensive evidence and the trial judge's assessment of witnesses, particularly Mr. Hurley. (Cert. Pet. App. at C14.) Giving due weight to the trial court's work, and its own independent review of the

record, the Supreme Judicial Court affirmed the court below. (*Id*).[10]

## SUMMARY OF ARGUMENT

The Council's reaction to GLIB's exercise of its right under the public accommodations statute to participate in the annual Evacuation Day/St. Patrick's Day Parade has been quite predictable to anyone familiar with the enforcement of civil rights laws. First, the Council, which is usually quite laissez faire in allowing groups to march in the Parade, objected to GLIB for "safety reasons and lack of information about the group." When those "reasons" proved unconvincing, the Council alleged that it had established a new "category" of forbidden entrants, those with "sexual themes." Not surprisingly, GLIB, which like many other groups marched with a banner stating its name, was the only group that fell under the ban. Only when the "sexual themes" rationalization collapsed as well, did the Council develop the First Amendment argument pressed here.

There is good reason why this argument has failed at least five times in state court. None of it is persuasive or bears any serious relationship to the facts of this case.

In this brief, we will examine each of the constituent parts of the Council's argument and show that each of

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[10] The Supreme Judicial Court also considered and rejected on the merits the Council's argument, raised for the first time on appeal, that the public accommodations statute is vague and overbroad. (Cert. Pet. App. at C15-16.)

them is without support either in the record that the Council made below or in this Court's settled case law.

First, this case involves the enforcement of a generally applicable anti-discrimination statute, not a statute targeted at speech. For this reason, the asserted impact on the Council's First Amendment interests is subject to the "intermediate level of scrutiny" afforded under such cases as *Turner Broadcasting System v. FCC*, ___ U.S. ___, ___, 114 S.Ct. 2445, 2469 (1994) and *United States v. O'Brien*, 391 U.S. 367 (1968).

Second, the Parade, probably unlike most parades, is a civic celebration that the City sponsored for many years and that the Council has administered for nearly five decades as an open recreational event, far more like Mardi Gras or a July Fourth celebration on a mall than like a political rally. As such, again probably unlike most parades, the event falls within the Commonwealth's public accommodations statute, which, even before the adoption of the Fourteenth Amendment, had broadly banned discrimination in public places, including "public meetings."

Third, while persons or groups in the Parade may indeed express a variety of messages, the Council itself has not used the Parade as the kind of expressive vehicle that would entitle it to an exemption from a generally applicable statute under this Court's case law. That statute serves a substantial state interest and targets conduct, not speech. Neither the statute nor the order enforcing it infringes on expressive activity except incidentally, and the statute and order are no broader than necessary to

achieve the Commonwealth's legitimate interest in ending unlawful discrimination.

Finally, the Council has not been "compelled" to say anything. It has been required only to treat GLIB like any other group, giving it the access to a public event that the statute requires. The Council's argument that GLIB's marching under an identifying banner forces the Council to utter a message it dislikes is specious. Sexual orientation, like religion or national origin, and sometimes race and disability, is not self-evident. Thus, to propose that mere identification on the basis of sexual orientation offends anyone's First Amendment rights in the context of a public event is to urge a proposition that is simply not defensible. If the Council were to say that it is not opposed to Irish Jews marching in the Parade as long as they do not identify themselves as a group, no one would take it seriously. The Council's argument that it does not exclude lesbians, gay men, and bisexuals, but only those who are identified as such deserves the same summary dismissal.

Some parades, like other forms of expressive conduct, are so tied to a specific expressive purpose, that enforcement of the public accommodations laws might truly infringe on expressive conduct in a way that the Constitution does not tolerate. The Parade the Council has created is simply not one of those parades.

## ARGUMENT

### I. THE COUNCIL'S CLAIM THAT IT IS EXEMPT FROM A GENERALLY APPLICABLE STATUTE AIMED AT CONDUCT FAILS: ENFORCEMENT OF THE STATUTE IN THIS CASE DOES NOT VIOLATE THE FIRST AMENDMENT, EVEN THOUGH IT MAY HAVE AN INCIDENTAL EFFECT ON THE COUNCIL'S CLAIMED FIRST AMENDMENT INTERESTS.

This case arises from the enforcement of a generally applicable statute that is now, and has been for more than a hundred and thirty years, targeted at conduct, not speech. The highest court of a state has held this statute applicable to the conduct before it. Accordingly, this Court's cases make clear that the power of the state to enforce the will of the legislature is not to be tested by the "strict scrutiny" standard that the Council and its amici invoke. Instead, the appropriate standard is an "intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech." *Turner Broadcasting Sys.*, ___ U.S. ___, ___, 114 S.Ct. at 2468 (*citing Ward v. Rock Against Racism*, 491 U.S. 781 (1989) and *United States v. O'Brien*, 391 U.S. 367 (1968)). Even if the Court accepts for purposes of analysis the Council's contention that its conduct has expressive elements, the record clearly establishes that the impact of the enforcement of state law on any such expressive conduct is well within the limits that the Constitution tolerates.

The Council insists that because it is administering a ***parade***, the impact of the statute on its activity should *ipso facto* be subject to the highest level of scrutiny under the First Amendment. (Pet'r Br. at 11.) But that is not the

law.[11] Notwithstanding the precious nature of First Amendment rights, those who claim the mantle of the First Amendment have no "special immunity from the application of general laws," no "special privilege to invade the rights and liberties of others," *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (citation omitted), and no "protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986).

This principle is not altered by the talismanic invocation of the label "parade." First Amendment jurisprudence is not so mechanistic that the quantum of protected expression depends on such labels.[12] It has instead developed serviceable principles, applied case by case, by which to assess laws aimed at conduct that may incidentally affect speech.

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[11] The fact that the Council can plausibly assert First Amendment interests in the conduct being regulated is not the only factor to be considered in determining the appropriate standard of review. Equally important to consider is whether the statute in question targets speech or, on the other hand, is a generally applicable statute aimed at conduct that incidentally affects speech. *Cf. Ward*, 491 U.S. at 791 ("The principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys").

[12] By the same token, it would be wrong to sidestep the First Amendment in this case, by simply calling the Parade a "public accommodation." As the state courts understood, the state law issue of whether this particular parade is a place of public accommodation is a distinct issue, anterior, although related, to the separate federal question concerning the constitutionality of applying the statute on the facts found here.

These principles apply in this case. Based on the findings and record below, there can be no question but that the event in question involves a substantial amount of conduct mixed with whatever expressive elements there may be. The Council did not make a speech or write a pamphlet. *Cf. Texas v. Johnson*, 491 U.S. 397, 406 ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."). The Council has not, at least until this year,[13] conducted a protest march.[14] On the contrary, the Council has administered what the state courts found was, in fact, an "open recreational event," with arguably expressive features. Because of the generality of the law at issue and the admixture of conduct, the First Amendment "weight" of whatever expressive elements may be

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[13] *See South Boston Allied War Veterans Council v. City of Boston*, No. 94-11402-MLW, 1995 WL 40641 (D.Mass. Jan. 17, 1995), *appeal docketed*, No. 95-1202 (1st Cir.).

[14] Both the Council, (Pet'r Br. at 11,) and amicus American Civil Liberties Union, (Br. of Amicus A.C.L.U. at 4, 11, 17) cite cases, *e.g.*, *Gregory v. City of Chicago*, 394 U.S. 111 (1969), *Forsyth County v. Nationalist Movement*, ___ U.S. ___, 112 S.Ct. 2395 (1992), that are said to create a special First Amendment niche for parades. In the first place, these cases concerned government attempts to stop a protest march from happening, either by arresting the marchers, *e.g.*, *Gregory*, 394 U.S. at 112, or by imposing permit conditions so onerous as to amount to a prior restraint, *Forsyth*, ___ U.S. at ___, 112 S.Ct. at 2401. These cases recognized that the protest marches at bench were protected under the First Amendment. However, they also recognized that the marches were protected *conduct*, *see Gregory*, 394 U.S. at 112, and they said nothing that supports the conflation of "pure speech" and "speech plus conduct" that the Council urges the Court to endorse in this case.

presumed to inhere in such an event is thus to be judged by the "intermediate" standard that this Court has long employed in cases involving "expressive conduct." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *see, e.g., United States v. O'Brien*, 391 U.S. 367, 376 (1988) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991); *Ward*, 491 U.S at 791.[15]

Under that familiar standard, the statute may be applied, and no exemption is warranted, if the regulation furthers an important governmental interest unrelated to the suppression of free expression and the restriction on alleged First Amendment freedoms is no greater than is necessary to further that interest. *Turner*, ___ U.S. at ___, 114 S.Ct. at 2469; *Ward*, 491 U.S. at 799; *see Roberts*, 468 U.S. at 628 (holding that an anti-discrimination statute can be enforced if the effect on speech is "no greater than is necessary to accomplish the State's legitimate purposes"). The requirement that the restriction on First Amendment interests be no greater than necessary is

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[15] *Cf. Cohen*, 501 U.S. at 669 (explaining that generally applicable laws do not offend the First Amendment simply because they have incidental effects on news gathering); *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 885 (1990) (holding that government's "ability to enforce generally applicable prohibitions of socially harmful conduct" is not defeated because it impedes some religious practices); *Church of the Lukumi Babalu Aye v. City of Hialeah*, ___ U.S. ___, ___, 113 S.Ct. 2217, 2226 (1993).

satisfied so long as the statute promotes a substantial governmental interest that would be achieved less effectively in the absence of the regulation. *Turner*, ___ U.S. at ___, 114 S.Ct. at 2466 (citing *Ward*, 491 U.S. 781, *O'Brien*, 391 U.S. 367).

This familiar "intermediate" standard is particularly appropriate in the present case because the Council has for many years been the gatekeeper for "the" annual Evacuation Day/St. Patrick's Day Parade in Boston. (Pet'r Br. at 3.) As the record below makes clear, this "traditional" street celebration is scarcely a "private" Parade, as the Council would have it. (Pet'r Br. at 13.) On the contrary, the Parade, and indeed whatever expressive elements the Parade embodies, do not belong to the Council. (*See* Pet'r Br. at 3.) The Parade belongs, and has always belonged, to all the citizens of Boston. It is a broad and encompassing civic event, like Mardi Gras[16] or July 4 celebrations, whose administration the City has consistently delegated to the Council for nearly a half century. (Cert. Pet. App. at B6-9.) This Court has recognized that even private entities and groups (which themselves enjoy First Amendment protection) may be subjected to governmental regulation that would otherwise be invalid, if they control a "critical pathway of communication" and are

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[16] The City of New Orleans has adopted an ordinance requiring the krewes that conduct the Mardi Gras parades, as a condition of obtaining a parade permit, to attest that the krewe does not unlawfully discriminate in membership on the basis of race, color, creed, religion, national origin, sexual orientation, ancestry, age, sex, physical condition or disability. New Orleans, La., Code, § 40C-109. There has been no successful First Amendment challenge to this provision.

thus in a position to "silence the voices of competing speakers." *Turner*, ___ U.S. at ___, S.Ct. at 2466.

In this connection, the Council's role as custodian of "the largest New England event for Irish-Americans, their friends and well-wishers" (Cert. Pet. App. at B9), is doubly significant. To the extent that the Council is, as the record discloses, a conduit through which groups enter the Parade rather than itself a speaker, its own First Amendment interests become less significant. On the other hand, the Council's power to exclude unwanted participants from the Parade, even if rarely used, increases the Commonwealth's interest in ensuring that the Council observes the access requirements of the public accommodations statute. *See Turner*, ___ U.S. at ___, 114 S. Ct. at 2468.

In the sections which follow, we will demonstrate that, under the appropriate standard of "intermediate scrutiny", the application of the statute in this case does not impermissibly intrude on any First Amendment interests of the Council.[17]

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[17] One amicus, the American Civil Liberties Union, argues that the state courts did not fully explore the way in which the City's longstanding pattern of delegating responsibility for "the" Evacuation Day/St. Patrick's Day Parade to the Council may have established a set of connecting arrangements under which the Council, acting as a surrogate for public authority, is obligated to exercise its delegated authority consistent with the Fourteenth Amendment. (Br. of Amicus A.C.L.U. at 19-22). If this case were to be remanded, the ACLU suggests that the Supreme Judicial Court should revisit that "state action" question. There is indeed abundant evidence in the record, cited by the trial judge in his opinion (Cert. Pet. App. at B14-22), that the

## II. THE STATE ANTI-DISCRIMINATION LAW SERVES SUBSTANTIAL GOVERNMENTAL INTERESTS UNRELATED TO SPEECH.

The Council apparently concedes, as it must, that the Commonwealth has a valid, compelling interest in prohibiting unlawful discrimination in places of public accommodation. (*See* Pet'r Br. at 23, 33.) Anti-discrimination statutes "'plainly serv[e] compelling state interests of the highest order.' " *Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 609, 629 (1987) (quoting *Roberts*, 468 U.S. at 624).

Moreover, the anti-discrimination statute is plainly a law of general application whose purposes are entirely unrelated to the suppression of free expression. The fundamental objectives of such statutes are to deter the deprivation of personal dignity inherent in the denial of equal access to places of "public accomodation and amusement" and to remove barriers to economic advancement and full political and social integration. *Roberts*, 468 U.S. at 625-26. The evils addressed by anti-discrimination statutes produce harm that is "wholly apart from the point of view such conduct may transmit." *Id.* at 628.

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Council's conduct of the Parade in conjunction with City authorities constitutes state action, and that ground for affirming the judgment of the Supreme Judicial Court is open to this Court, even though it was raised only in a reply brief in that court, and rejected. *Cf. Teague v. Lane*, 489 U.S. 288 (1989). The City's long-standing delegation of administration of an important civic event to a nominally private party would support such a conclusion. *See Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

In the present case, neither the Massachusetts public accommodations statute nor the injunction enforcing it is addressed to expression. The statute whose application is at issue makes no "distinctions based on viewpoint." *Rotary Int'l*, 481 U.S. at 549. Accordingly, the only question left to be decided is whether the application of the statute in this instance burdens more speech than is necessary to advance the important governmental interests underlying the statute. *Turner*, ___ U.S. at ___, 114 S.Ct. at 2469; *Roberts*, 468 U.S. at 628-29. To that issue we now turn.

## III. THE STATUTE RESTRICTS EXPRESSIVE INTERESTS NO MORE THAN IS NECESSARY TO FURTHER THE COMMONWEALTH'S SUBSTANTIAL INTERESTS IN ELIMINATING DISCRIMINATION.

The application of the state anti-discrimination law to the Council's conduct in this instance "responds precisely to the substantive problems which legitimately concern the [Commonwealth]." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984). Applying the statute eliminates an instance of the discrimination that the legislature aimed at ending. Enforcement in this case will also ensure that the policies behind the public accommodations law are not defeated by unsupported generalizations about the degree of intrusion on expressive association wrought by the statute in this instance. *See Roberts*, 468 U.S. at 627-28; *cf. Clark*, 468 U.S. at 296-97 (holding that a regulation need not be judged solely by reference to its impact on the expressive elements of conduct *sub judice*).

The close fit between the Commonwealth's substantial interest in banning discriminatory conduct and the remedial measure taken here would seem to warrant affirmance without more. *Barnes*, 501 U.S. at 567; *Ward*, 491 U.S at 791. However, we address the alleged harm to the Council's First Amendment interests in detail, to show that the claims of significant harm are insubstantial.

### A. Neither the Anti-Discrimination Law Itself Nor the Order Enforcing it in this Case "Compels" Speech on the Part of the Council.

The Council contends that the application of the Massachusetts public accommodations statute to the administration of the Parade requires it to mouth a message that it finds offensive. (Pet'r Br. at 28.) This contention is simply old wine in new bottles. Presumably, the manager of Ollie's Barbeque had a point of view about serving African-Americans. However, he could not have prevailed in *Katzenbach v. McClung*, 379 U.S. 274 (1964), by asserting that compliance with the Civil Rights Act "compelled" him to utter a message he found uncongenial. The same would undoubtedly be true if an employer refused to hire Jews. Upon analysis, it becomes clear that, on the facts of *this* case, the Council's argument fares no better, despite the talismanic invocation of the "parade" label and the substitution of sexual orientation for race or religion as the proscribed basis of discrimination.

In the end, a settled principle controls here: "[A]cts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul*, ___ U.S. ___, ___, 112 S.Ct. 2538, 2546-47 (1992). The "compelled speech" and "forced access" cases deal with factual situations entirely different from this case. *See also Roberts*, 468 U.S. at 622-23; *Turner*, ___ U.S. at ___, 114 S.Ct. at 2469; *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980); *but cf. South Boston Allied War Veterans*, 1995 WL 40641 at *5 (concluding that a different parade, organized around what the court found to be a non-pretextual "protest theme," would be entitled to an exemption from the public accommodations statute).

It is important to disentangle the actual issues involved here from problems this case does *not* present. First, the Commonwealth has not compelled the Council "to 'say' anything; and it has not forced [the Council] to communicate ideas with nonverbal actions reasonably likened to 'speech,' such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture." *Wooley v. Maynard*, 430 U.S. 705, 720 (1977) (Rehnquist, J., dissenting); *accord PruneYard*, 447 U.S. at 88 (finding no compulsion of property owners to "affirm their belief in any governmentally prescribed position or view"); *Turner*, ___ U.S. at ___, 114 S.Ct. at 2454 (concluding that "must-carry" regulations do not compel broadcasters to "affirm points of view with which they disagree").[18]

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[18] To put it another way, in view of the facts and circumstances of this Parade, the Council is plainly not an "association engaged exclusively in protected expression" of the sort to which Justice O'Connor referred in her concurring opinion in *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring).

Second, and equally important, the Commonwealth has not prescribed or dictated any specific message that the Council is required to display in the Parade. *See Roberts*, 468 U.S. at 623-624 (recognizing that state anti-discrimination laws are not aimed at the suppression of speech and do not discriminate on the basis of viewpoint). Accordingly, there is no danger in this case of "governmental discrimination for or against a particular message." *PruneYard*, 447 U.S. at 87.

Finally, this case cannot be analogized to this Court's "forced access" (as opposed to "compelled speech") cases. (Pet'r Br. at 22). *See Pacific Gas & Elec. Co.*, 475 U.S. 1, 18 (1986); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). As the Court explained in *PruneYard*, *Tornillo* involved a "right of access" that functioned as a content-based penalty upon a newspaper's speech and that created a danger of suppressing public debate "by deterring editors from publishing controversial political statements that might trigger the application of the statute." *Turner*, ___ U.S. at ___, 114 S.Ct. at 2464-65; *PruneYard*, 447 U.S. at 88. Likewise, the compelled "access" in *Pacific Gas & Electric* was not content-neutral but rather was limited to persons who disagreed with the utility's views. *See Pacific Gas & Elec. Co.*, 475 U.S. at 13. That amounted to conferring benefits on speakers based on viewpoint. *Turner*, ___ U.S. at ___, 114 S.Ct. at 2465.

The facts in this case contrast sharply with those in *Wooley*, *Tornillo*, and *Pacific Gas & Electric*. In this case, the Council objects to the enforcement of a content-neutral ban on unlawful discrimination in a forum that the Council itself has opened to virtually all comers. Thus, there is no danger that the Council's highly publicized aversion

to GLIB will be obscured or that GLIB's presence will be mistaken for an endorsement by the Council of openly expressed same-sex sexual orientation. *See Turner*, ___ U.S. at ___, 114 S.Ct. at 2465-66; *PruneYard*, 447 U.S. at 87.

The Council's objection to the Massachusetts civil rights law and its application in this instance does not establish that the Council is constitutionally entitled to conduct this particular event in defiance of that law. If such a point of view *were* sufficient in itself for an exemption, then every operator of a place of public accommodation who wishes to discriminate on a proscribed basis would be able to do so and to cite the First Amendment in justification. That is not the law.

"'[I]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections'." *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973); *see Wisconsin v. Mitchell*, ___ U.S. ___, ___, 113 S. Ct. 2194, 2200-2201 (1993) (holding that a penalty-enhancement statute for bias-motivated offenses does not violate the First Amendment); *R.A.V. v. City of St. Paul*, ___ U.S. at ___, 112 S. Ct. at 2546-47. Citizens who disapprove of laws are entitled to express their dissenting views, explicitly in speeches and articles or symbolically in demonstrations, parades, and other activities. But nobody has a first amendment right simply to refuse to comply with laws he or she finds objectionable.

The Council nevertheless seeks to avoid the state courts' determination that exclusion of GLIB constituted

discrimination. It makes a spurious distinction between (1) having to allow GLIB members to march and (2) having to allow GLIB marchers to march while self-identifying as lesbians, gay men or bisexuals by means of a banner. The Council argues that the order of the courts below has done more than prohibit discrimination; the order has gone a step further to "mandate dissemination of an ideological message supported by those it seeks to protect." (Pet'r Br. at 23.)

First, the Council's argument misapprehends the state court ruling. GLIB obtained a judgment and order preventing the Council from excluding GLIB from the Parade "because of the group members' sexual orientation." (Cert. Pet. App. at B28.) The order requires that GLIB be allowed to participate "in the same manner and under the same terms and conditions applicable to all other participants in the Parade." (*Id.* at B29.) The order therefore requires nothing more than the cessation of discrimination, to which the Council seemingly does not object,[19] and a consequent obligation of equal treatment

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[19] The Council's assertion that it does not "knowingly" exclude individual gay and lesbian participants merely acknowledges that the Council has no practical means of singling such individuals out from the throng. If, however, individuals march together behind the GLIB banner, the Council *can* distinguish them and eliminate them *en masse*. The distinction the Council hopes to draw, then, is a distinction of convenience. When individuals participate anonymously, the Council does not undertake to identify and banish them on the basis of their sexual orientation. When, however, individuals identify themselves, the Council *can* single them out for discrimination. That is precisely what the Council proposes to do, in violation of the Massachusetts anti-discrimination law.

with respect to the terms and conditions of participation. Such an order hardly constitutes "forced speech" or content-based "forced access." If GLIB is permitted to march behind an identifying banner, it is only because the Council permits other groups to identify themselves by carrying banners.

Second, the Council simply ignores the reality that, like characteristics such as religion or national origin, sexual orientation is a characteristic that is not generally self-evident to observers without some kind of "sign." A statute can effectively discourage discrimination on the basis of religion only if individuals identify themselves as members of religious groups, for example, by wearing a Star of David, a cross, or a head covering. The protection of the anti-discrimination laws extends to self-identifying Jews, or Catholics, or Sikhs, and not just to those whose religion is not visually apparent. Indeed, it is precisely the self-identifying Jew or Catholic or Sikh who is in need of, and entitled to, the protection of anti-discrimination statutes.

The same is true, of course, for gay men, lesbians and bisexuals. To contend in this case, then, that when gay men, lesbians, and bisexuals identify themselves as such, they concomitantly advance a message that the Council is entitled to reject, is to urge that public accommodations statutes barring discrimination against members of the class protected by such laws cannot constitutionally be enforced.[20]

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[20] Nor can the Council persuasively assert a right not to "speak when it would prefer to remain silent." (Pet'r Br. at 25.)

Moreover, the Council's position bears all the marks of *post hoc* rationalization designed as a stratagem for evading the public accommodations law. The Council contends that the mere presence of an identified GLIB contingent would convey a "sexual theme" that is inconsistent with the "family values" the Council itself wishes to foster.[21] Conveniently, this purported criterion finds virtually *all* messages and identifications acceptable, except for GLIB's identifying banner, which is unerringly singled out for exclusion. Small wonder the state courts below flatly refused to believe that the Council actually uses any such criterion to choose Parade participants.

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An employer cannot resist application of Title VII on the ground that compelled employment of an African-American would require the employer to "break her silence" on issues of race. The very purpose of public accommodations statutes is to protect the right conferred by state law to participate in public life without having to hide identity or remain silent about it. The state's interest in preventing discrimination in public accommodations and amusements could not be effectively furthered were such a defense recognized.

[21] This proposition is scarcely self-evident. On the contrary, it is clearly wrong. GLIB marchers are, to be sure, citizens who affirm their sexual orientation. Yet the message they wish to convey by participating in the Parade is simply the existence of gay men, lesbians, and bisexuals as part of the Irish-American community. If a contingent from the NAACP were to march in the parade, with or without an identifying banner, it is inconceivable that the Council, or anyone else, would conclude that a "racial" theme would somehow be pressed. The Council's inability to see anything but a "sexual" theme in GLIB's message is only further evidence of the Council's discriminatory intent to bar GLIB's members from this event because of their sexual orientation.

### B. Any Incidental Impact on the Council's Expressive Interests is Justified by the Advancement of the Commonwealth's Interest in Eliminating Unlawful Discrimination.

The hallmark of the expressive association doctrine addressed in cases such as *Roberts*, 468 U.S. 609, *Rotary International*, 481 U.S. 537, and *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958) is *membership*, and efforts by government to prevent the joining together of individuals to advance expressive interests. Those cases are inapposite here, as the Council appears to concede. (Pet'r Br. at 32.) The state courts did not require the admission of GLIB to membership in the Council or preclude the Council's members from expressing their views on any subject whatever, in any forum whatever, including the Parade. The state courts did not hold that the Council itself is a place of public accommodation to which the Massachusetts statute applies. They held that the event that the City conducted for years and that the Council has more recently conducted is such a place.

The Council nonetheless invokes the right of association for expressive purposes here, as an alternative means of asserting its claim that the content of its message is somehow impaired or diluted by application of the anti-discrimination statute on the facts of this case. (Pet'r Br. at 32-33.)

The Council's claim, thus articulated, is no more persuasive than its claim that it has been compelled to speak. The findings below, solidly based on the evidence, make plain that application of the civil rights law to the

administration of the Parade would not burden *the Council's* ability to express some message symbolically at all, and surely no more than is reasonably necessary to vindicate the state's anti-discrimination policies.

No one has suggested, of course, that the Parade itself is devoid of expressive value. Far from it. Most or all the actual participants have their own messages. Political candidates doubtless consider the Parade to be a campaign appearance, and corporations presumably regard their participation as a form of commercial advertising. In this self-evident sense, the Parade fairly bristles with communicative content. Indeed, GLIB, too, would have contributed a message if it had been allowed to participate. It does not follow, however, that the Council's involvement shares much, or any, of the same expressive character.

Because the Council functions chiefly as the administrator[22] of the event, its own message, to the extent that there is one, must be inferred from its conduct in admitting groups to the Parade. *Cf. Turner*, ___ U.S. at ___, 114 S.Ct. at 2465 (discussing cable's "long history of serving as a conduit"). The Council argues, in effect, that it stands in the place of an orchestra conductor, who places his or her mark on a performance by selecting and organizing constituent parts and blending a variety of elements into

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[22] Various Council members are Parade officials and march as such, and those members of the Council who are part of the Council's staff march as a group. (J.A. at 44.) There is no suggestion that such persons' participation expresses anything other than their presence, any more than GLIB's participation carries the same message.

the whole. The Council insists that the First Amendment establishes its right to conduct cacaphony rather than symphony, if it chooses to do so.

On the record developed at trial, however, the state courts concluded that the Council's selections contain no substantial indirect expression apart from the Council's objection to the application of the civil rights laws to this event. In effect, the state courts found that the Council has more the role of a restaurant maitre d'„ who reserves a table for anyone who calls, seats arrivals in proper turn, and bears little or no relation to the disparate dinner conversations that ensue.[23]

There was, to be sure, testimony that the Council selected participants as an implicit, symbolic means of endorsing "traditional family values." But on the record as a whole, the state courts properly concluded that that evidence, to the extent it was credible, simply failed to establish any expression bound up in the Council's administration of the parade that would be genuinely and seriously affected by the application of the civil rights laws.[24] Certainly, there was no credible evidence that the

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[23] We take no issue with the unremarkable proposition that the First Amendment protects not only a speaker's single distinct message, but also eclectic expression. (Pet'r Br. at 16.) But the judgment below rests on a finding that there was simply very little, if any, expression in the Council's administration of the Parade.

[24] The Council contends that it has excluded the Ku Klux Klan and ROAR, an anti-busing group, and that it has sometimes allowed other groups to participate only on condition that they "circumscribe their messages." (Pet'r Br. at 15.) The occasional exercise of selective judgment does not,

Council is "organized for specific expressive purposes" and will be unable to advocate its "viewpoints" nearly as effectively unless it is permitted to administer this event without complying with the state anti-discrimination law. *New York State Club Ass'n*, 487 U.S. at 13.[25]

Fact-sensitive cases like this one come in all sizes and shapes. Cases at the extremes are relatively easy. If, for example, the proprietor of the Cheers Bar were to propose that he or she admits only guests whose presence comports with white supremacy, no court would hold, on that ground, that the bar can validly exclude a party of

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however, establish a pattern of selectivity that would seriously fortify the Council's argument here. The maitre d' may occasionally double as a "bouncer," but that does not alter his or her fundamental role. *See New York State Club Ass'n*, 487 U.S. 13.

[25] By its own submissions, the Council has not had, and does not now have, an "anti-gay" message to convey. (J.A. at 105.) Therefore, this is not a case where the inclusion of self-identified gay people will dilute or distort an event with an "anti-gay" theme or message. *Cf. Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 288 (D.Md. 1988) (upholding right of Klan to march without NAACP participation but reserving the question of whether an anti-discrimination law of general applicability would require a different result). *See also Tashjian v. Republican Party*, 479 U.S. 208, 214-16 (1986) (holding that law permitting non-members to vote in party primary impermissibly burdens first amendment rights of members). The Council has merely expressed a desire to exclude self-identified lesbians, bisexuals and gay men from the Parade. As noted above, the Council cannot transform this discriminatory motive into a First Amendment shield against the Massachusetts anti-discrimination statute.

NAACP conventioners in defiance of a local anti-discrimination ordinance. Similarly, no court would take seriously any claim that the ticket-takers at Fenway Park select only fans whose desire to see the Red Sox play is consistent with the promotion of masculine solidarity, such that the local chapter of NOW can be denied a block of tickets for a Sunday outing, or a claim that the First Night celebration in Boston fosters xenophobic nationalism, such that a Japanese tour group can be told to stay away.

At the other extreme, some activities are plainly expressive and therefore entitled to serious First Amendment attention. When members of a Nazi organization wanted to parade through Skokie, Illinois, they themselves were clearly engaged in expression and thus were able to rely on the First Amendment. The content of their message, no matter how disturbing to others, was due the respect that the first amendment affords in an open society. *Cf. National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977) (granting expedited review to consider the obvious First Amendment claims).

The question in this case is whether the courts of the Commonwealth committed reversible error in placing the Council's administration of a particular event closer to administering Mardi Gras or First Night than marching of a column of brown shirts through a neighborhood of Holocaust survivors. On the record the Council made, the state courts placed the Council's conduct of this event with constitutional accuracy.

### C. The Anti-Discrimination Law is Not Overbroad.

The Council argues that it cannot be required to comply with the public accommodations statute, because the statute is unconstitutionally overbroad in violation of the First and Fourteenth Amendments. Assuming that this claim is encompassed within the questions on which the Court granted the petition for certiorari, the overbreadth contention can be quickly disposed of.

In the Supreme Judicial Court, the Council argued that the statute is overbroad because "it reaches constitutionally protected speech in that it allows the court to examine the content of speech with standardless discretion." (Cert. Pet. App. at C15.) But the Supreme Judicial Court, whose interpretation of the statute the Council acknowledges to be conclusive (Pet'r Br. at 36), has stated that it would not "interpret [the statute] so that [it] could reach and unconstitutionally infringe on speech." (Cert. Pet. App. at C15 (citations omitted).[26] The Supreme Judicial Court's construction of the statute as applying to the unique Parade at issue here (which is all that court decided (Cert. Pet. App. at C13 n. 18)) can support the "as applied" challenge to the statute that the Council has made, albeit unsuccessfully. It cannot support a facial

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[26] As the Supreme Judicial Court noted, the contention that the trial judge impermissibly inquired into the content of the Council's speech is not correct. Rather the judge made the inquiry required in this case, *see* Argument III, *supra*, as to whether the Council had shown protected First Amendment activity sufficient to entitle it to an exemption from a statute of general application. *(See* Cert. Pet. App. at C15 n.20, C16.)

attack on the statute on the ground that it applies to protected speech, when the vast majority of the applications of the statute do not apply to speech at all. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

In this Court, the Council seems to make a different argument: the statute is overbroad because "nearly all" rallies, demonstrations, parades, marches, or protests occurring on public streets "are regulated as to their participants and messages by the Massachusetts public accommodations law." (Pet'r Br. at 37.) A very similar argument was made in *New York State Club Ass'n*, 487 U.S. 1. In that case, the New York City Human Rights Ordinance was challenged on the ground that it intruded too broadly on the associational rights of clubs. The Court easily rejected that challenge because there, as here, the challenger failed to demonstrate "from the text of [the law] and from actual fact that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally." *Id.* at 14. In *New York State Club Ass'n*, as in this case, no record was made in the trial court, and this Court could not thus "conclude that the [l]aw threatens to undermine the associational or expressive purposes" of a substantial number of clubs. *Id.* Accordingly, the Court could not "conclude that the law is substantially overbroad and must assume that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.* (internal quotation marks and citation omitted); *see R.A.V. v. St. Paul*, ___ U.S. at ___, 112 S.Ct. at 2542-2548. That course requires rejection of the Council's overbreadth challenge in the present case.

## IV. THE FINDINGS AND CONCLUSIONS OF THE STATE COURTS BELOW ARE AMPLY SUPPORTED BY THE RECORD.

As we have demonstrated, the Council's challenge to the statute, on its face and as applied, fails on the law and on the facts found in the trial court, as affirmed by the Supreme Judicial Court. The Council's suggestion that this Court should reach a different result by parsing the record differently must also fail.

The courts below appreciated the fact-sensitive nature of this case, and were fully aware that the Council would have a much stronger claim to an exemption from the public accommodations law if it appeared that its administration of the Parade advanced an expressive purpose that would be seriously impaired by an order requiring the Council to admit GLIB. (*E.g.*, Cert. Pet. App. at B25 n.27; C13-14 at n.18.) Accordingly, those courts carefully considered the testimony and evidence at trial and reached their findings and conclusions in light of that thorough investigation. Those findings and conclusions are correct and should be sustained here.

The state superior court squarely found that the Council's assertions in support of its First Amendment claims were specious – a pretext for evading the application of the civil rights act. That factual finding is firmly rooted in the evidence adduced at trial and the credibility assessments made there.

The superior court primarily relied on the Council's own evidence regarding the nature of the Parade. On the basis of that evidence, the court discerned little expression at all in the Council's decisions to include other

groups, but to exclude GLIB. Indeed, the superior court concluded that the Council is not genuinely selective at all about would-be participants. As a practical matter, it admits virtually everyone but GLIB.

The superior court was fortified in that factual finding by other evidence at trial, which plainly demonstrated that the Council's attempt to cloak its administration of the Parade as an expression of its views is pretextual.

For example, the Council initially cited "safety reasons" and "insufficient information" as the explanations for refusing to consider GLIB's application. Later, it gave a different explanation – its suspicions that some members of GLIB were also members of ACT-UP and Queer Nation, whose purposes the Council apparently believed to be disruptive. The shift to a demand for a First Amendment exemption came still later, when it may have appeared to the Council that the Constitution offered a safer haven.

The superior court also found that the Council's chief administrative officer, Mr. Hurley, "equivocated" on the witness stand regarding his reasons for excluding GLIB. Hurley offered inconsistent and fluctuating explanations that, again, tended to show that the Council's reliance on the First Amendment is pretextual. These factual findings, sustained on appeal by the Supreme Judicial Court, are entitled to substantial weight here.

It is settled, of course, that in First Amendment cases this Court makes an "independent examination of the whole record" in order to ensure that "the judgment [below] does not constitute a forbidden intrusion on the

field of free expression." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984), (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286 (1964)).[27]

Yet the precise nature of this Court's appellate review of fact-finding is a complex matter. The findings of state courts, reached after thorough litigation at trial, are not to be ignored entirely, but rather are entitled to respect. The measure of that respect is a function of three variables: (1) the character of the relevant factual issue (that is, whether the question is one of historical fact in the sense of a description of the primary elements of an historical event, or, instead, calls for some inference from the historical facts); (2) the character of the finder of fact below (that is, whether the trier of fact was a judge or a jury); and (3) the extent to which the relevant finding depends on credibility choices by the trier of fact.

Most of the primary, historical facts in this case were undisputed at trial. There was no disagreement, for example, that: (1) the Council had no written procedures or standards for selecting participants for the Parade

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[27] The Supreme Judicial Court below also shouldered this same responsibility for "independent review." Independent review is not incompatible with the application of Mass. R. Civ. P. 52(a), which provides that findings of fact shall not be set aside unless "clearly erroneous." In *Bose Corp.*, this Court itself reconciled "independent review" in speech cases with Fed. R. Civ. P. 52(a), on which Mass. R. Civ. P. 52(a) is patterned. *Bose Corp.*, 466 U.S. at 498-501. Both the federal and state rules contemplate that the appellate court will review the entire record in order to decide whether the facts found below are sufficiently supported by the evidence. *Bose Corp.*, 466 U.S. at 499-500; *see Cox v. New England Tel. and Tel. Co.*, 607 N.E.2d 1035, 1040 (Mass. 1993).

(Cert. Pet. App. at B7; C8); (2) groups seeking to participate in the Parade were routinely given application forms and information about the Parade route (*id.*); (3) many widely divergent organizations and groups were scheduled to participate in the event – just as they had in previous years (Cert. Pet. App. B6-7; C8); (4) some groups and individuals had been allowed to participate in similar, previous Parades without submitting application forms in advance – e.g., members of the Boston Bruins hockey club. (App. B8, C8.)

### A. The Crucial Finding Below Was One of Historical Fact.

The most important disputed issue at trial was whether the Council selected participants according to any standard at all or, instead, opened the event to the public generally. That issue turned on what the individual administering the event, Mr. Hurley, understood his task to be – that is, what was in his mind at the time he approved other participants, but barred GLIB. The content of Hurley's mind at that juncture was plainly a matter of historical fact. *Hernandez v. New York*, 500 U.S. 352, 367 (1990) (holding that a state court finding of discriminatory intent is a factual determination entitled to deference even if it relates to a constitutional issue); *Bose Corp.*, 466 U.S. at 498; *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982) (holding that discriminatory intent under Title VII is question of pure fact reviewable only for clear error).

In close cases, this Court has typically characterized questions as factual or legal in a way that achieves the

most appropriate forum allocation: if it appears that an issue is best left to the jury or the trial judge, then it usually is considered to be one of fact; if, however, an issue is better determined by an appellate court, it is typically considered to be one of law or a mixed question. *Cf. Miller v. Fenton*, 474 U.S. 104, 113-15 (1985). In this instance, the nature of what Hurley was thinking and doing, and, therefore, the nature of the event he was administering, is the kind of factual issue that is best left to the trier of fact, who actually observed Hurley on the witness stand.

In sharp contrast to conventional analysis, the Council asserts that this Court must disregard the trial court's finding on this vital point and substitute its own *de novo* assessment of Hurley's intentions from the cold record. The obscenity and libel cases the Council cites for such a questionable approach involve questions of an entirely different order. Matters such as whether material is "patently offensive" or whether a speaker acts with "actual malice" are not issues of primary, descriptive, historical fact at all. Those questions cannot be resolved solely by investigating historical events and assessing the credibility of witnesses, but rather demand substantial judicial judgment. The more judgment a question is understood to require, and the less simple historical investigation, the more suitable the question is for consideration on appeal.

Moreover, lower courts administering the federal law of obscenity and libel require some consistent understanding of what counts as "patently offensive" material or personal attacks with "actual malice" and can get that

guidance only if this Court reviews lower court judgments and uses its appellate opinions to elaborate those issues. Only in that way can this Court achieve some rough uniformity in a series of cases in which more or less the same issue is presented in similar circumstances.

When, however, the question in a case is the "subjective state of mind" that a *"particular"* person had at a *"particular"* time, then the issue is clearly one of descriptive, historical fact that is best left to the trial judge who saw the relevant witness testify. *Bose Corp.*, 466 U.S. at 518 n.1 (Rehnquist, C.J., dissenting). An issue of this kind does not arise routinely in a category of cases, but, instead, is presented only in an isolated lawsuit and will not reappear somewhere else. The justifications for more extensive appellate review in the obscenity and libel contexts have no purchase here, any more than they would in a fact-bound negligence case.

### B. The Crucial Finding Was Made by a Judge.

The key factual question in this case was specifically determined by an experienced trial judge, who set out the evidence and explained his evaluation. This Court is not, then, invited to rely on factual findings that may have been subsumed within a jury's general, unexplained verdict. The Chief Justice has explained that independent review of fact-finding is justified primarily in cases in which the facts were found by a jury, rather than by a trial judge. *Bose Corp.*, 466 U.S. at 518 n.2 (Rehnquist, C.J., dissenting) (joined by O'Connor, J.).

### C. The Finding Was Based on the Trial Court's Credibility Choices.

Finally, the key finding below was largely reached on the basis of the superior court's assessment of credibility. Even in a First Amendment case, this Court may properly decline to "second-guess" a trial judge on the "credibility of the witnesses." *Bose Corp.*, 466 U.S. at 500.[28] In *Bose Corp.* itself, this Court accepted the trial court's determination that the author of a magazine article "did not provide credible testimony concerning the reason for his choice of words and his understanding of the meaning" of one of the words used. *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 689 n.35 (1989) (quoting *Bose Corp.*, 466 U.S. at. 511-12).

In this case, the superior court judge had the opportunity to observe Hurley on the stand and to judge his credibility. As noted, the judge found that Hurley "equivocated about his reasons for excluding GLIB" and provided inconsistent explanations of his behavior. (Cert. Pet. App. at B3.) Then, in light of uncontested evidence that Hurley had allowed other groups to participate without applying any objective standard, the trial judge concluded that Hurley, in fact, generally performed only the

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[28] Both the "independent review" responsibility in First Amendment cases and the "clearly erroneous" standard for reviewing factual findings permit an appellate court to respect trial-level judgments regarding the credibility of witnesses. *Bose Corp.*, 466 U.S. at 499-500 (noting that Fed. R. Civ. P. 52(a) commands that "due regard" be given to "the trial judge's opportunity to observe the demeanor of the witnesses" and recognizing that the "constitutionally based rule of independent review" permits that opportunity to be "given its due").

ministerial function of processing all applications for approval. (*Id.* at B4 n.5.)[29]

In sum, the superior court concluded that Hurley did not exercise judgment on applications and approve for participation only organizations and groups whose involvement was consistent with expressive themes identified by the Council. (Cert. Pet. App. at B24-25.) Instead, the court determined that, in fact, Hurley administered the Parade as an "open recreational event" to which everyone was freely invited – everyone, that is, except GLIB, which was excluded on the basis of its sexual orientation. (*Id.* at B9, 25, 27.)

The Chief Justice has explained that an appellate court is not well positioned to make a "*de novo* determination about the state of mind of a particular author at a particular time," which typically turns not on "objectively reviewable facts in the record," but rather on "an evaluation of credibility." Assessments of that kind are "best left to the trial judge." *Bose Corp.*, 466 U.S. at 519 (Rehnquist, C.J., dissenting) (joined by O'Connor, J.).[30]

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[29] The superior court also may have relied in part on argument by counsel – which may also be the basis on which findings of historical fact rest. *E.g., Cox v. Louisiana*, 379 U.S. 536, 566 (1965).

[30] Concurring in *Harte-Hanks Communications*, Justice White said:

> In my view, in cases like this the historical facts – e.g., who did what to whom and when – are reviewable only under the clearly-erroneous standard mandated by Federal Rule of Civil Procedure 52. Credibility determinations fall in this category, as does the issue of knowledge of falsity." 491 U.S. at 694 (joined by Rehnquist, C.J.).

### D. The Supreme Judicial Court Properly Sustained the Superior Court's Findings.

The Council charges that the Supreme Judicial Court below failed to undertake its constitutional obligation to review the entire record to ensure that the trial court's determinations, including its determinations of fact, properly respected the Council's First Amendment rights.

To upset the Supreme Judicial Court's judgment on this score, this Court must fasten on that court's properly appreciative references to the work of the trial judge; attach significance to the state court's failure to articulate the "independent review" doctrine explicitly; and ignore the state court's statements that it did, indeed, examine the entire record. (Cert. Pet. App. at C6, C7 n.9, C8 n.10, C11, C13-14 n.18; C14, C15.) This Court reviews state court judgments, not state court opinions. So long as it appears from a fair reading of the whole of such an opinion that the state court has not mistaken its duty and has, instead, actually applied the appropriate constitutional standard, its judgment should be sustained. *Accord Harte-Hanks Communications*, 491 U.S. at 667-68.

The Council also contends that the Supreme Judicial Court reached the wrong result on the merits of the central factual issue. Simply put, the Council insists that the Supreme Judicial Court should have substituted its judgment about what Hurley was thinking and doing at the critical time for the different assessment made by the trial judge, who saw Hurley on the witness stand. To do that, the Supreme Judicial Court would have had to set aside considerations that routinely call for appellate deference to trial court findings: this issue is one of primary,

historical fact; the trier of fact at trial was an experienced trial judge, not a jury; and, perhaps most important, the determination to be made depended on the trial court's assessment of Hurley's credibility. It is untenable to insist that the Supreme Judicial Court should have done any such thing, much less that this Court should do so now, at a stage even further removed from the "feel" of the trial.

## CONCLUSION

The task in this case, as in all such highly fact-driven cases, is to examine the record below and to determine whether the courts of the Commonwealth committed reversible error in their appraisal of the evidence regarding *this* singular event and the legal implications that follow. This task is not aided by the invocation of formalistic labels, and the courts below resisted any attempt to resolve the case in that fashion. Instead, they looked closely at the facts. What they found was that the Council, dishonoring its long history as the faithful steward of a splendid public event, is attempting to use the First Amendment as a ruse for evading the Commonwealth's anti-discrimination laws and, into the bargain, drowning out other legitimate voices. The state courts reached this conclusion after laboring over this case, as it unfolded

over a two-year period. They got it right. For the reasons given above, this Court should affirm their judgment.

Respectfully submitted,

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## APPENDIX A

**M.G.L. C. 272**

**§ 92A. Advertisement, book, notice or sign relative to discrimination; definition of place of public accommodation, resort or amusement**

No owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement shall, directly or indirectly, by himself or another, publish, issue, circulate, distribute or display, or cause to be published, issued, circulated, distributed or displayed, in any way, any advertisement, circular, folder, book, pamphlet, written or painted or printed notice or sign, of any kind or description, intended to discriminate against or actually discriminating against persons of any religious sect, creed, class, race, color, denomination, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, nationality, or because of deafness or blindness, or any physical or mental disability, in the full enjoyment of the accommodations, advantages, facilities or privileges offered to the general public by such places of public accommodation, resort or amusement.

A place of public accommodation, resort or amusement within the meaning hereof shall be defined as and shall be deemed to include any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be (1) an inn, tavern, hotel, shelter, roadhouse, motel, trailer camp or resort for transient or permanent guests or patrons

seeking housing or lodging, food, drink, entertainment, health, recreation or rest; (2) a carrier, conveyance or elevator for the transportation of persons, whether operated on land, water or in the air, and the stations, terminals and facilities appurtenant thereto; (3) a gas station, garage, retail store or establishment, including those dispensing personal services; (4) a restaurant, bar or eating place, where food, beverages, confections or their derivatives are sold for consumption on or off the premises; (5) a rest room, barber shop, beauty parlor, bathhouse, seashore facilities or swimming pool, except such rest room, bathhouse or seashore facility as may be segregated on the basis of sex; (6) a boardwalk or other public highway; (7) an auditorium, theatre, music hall, meeting place or hall, including the common halls of buildings; (8) a place of public amusement, recreation, sport, exercise or entertainment; (9) a public library, museum or planetarium; or (10) a hospital, dispensary or clinic operating for profit; provided, however, that with regard to the prohibition on sex discrimination, this section shall not apply to any corporation or entity authorized, created or chartered by federal law for the express purpose of promoting the health, social, educational, vocational, and character development of a single sex; provided, further, that with regard to the prohibition of sex discrimination, those establishments which rent rooms on a temporary or permanent basis for the exclusive use of persons of the same sex shall not be considered places of public accommodation and shall not apply to any other part of such an establishment.

Any person who shall violate any provision of this section, or who shall aid in or incite, cause or bring about,

in whole or in part, such a violation shall be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than thirty days, or both.

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M.G.L. C. 272

**§ 98. Discrimination in admission to, or treatment in, place of public accommodation; punishment; forfeiture; civil right**

Whoever makes any distinction, discrimination or restriction on account of race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, deafness, blindness or any physical or mental disability or ancestry relative to the admission of any person to, or his treatment in any place of public accommodation, resort or amusement, as defined in section ninety-two A, or whoever aids or incites such distinction, discrimination or restriction, shall be punished by a fine of not more than twenty-five hundred dollars or by imprisonment for not more than one year, or both, and shall be liable to any person aggrieved thereby for such damages as are enumerated in section five of chapter one hundred and fifty-one B; provided, however, that such civil forfeiture shall be of an amount not less than three hundred dollars; but such person so aggrieved shall not recover against more than one person by reason of any one act of distinction, discrimination or restriction. All persons shall have the right

to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement subject only to the conditions and limitations established by law and applicable to all persons. This right is recognized and declared to be a civil right.

Supreme Court, U.S.
FILED
1995
OFFICE OF THE CLERK

No. 94-749

# In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHN J. HURLEY, INDIVIDUALLY, AND THE SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,
PETITIONERS,

*v.*

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, AN UNINCORPORATED ASSOCIATION, BY AND THROUGH TIMOTHY DALEY, BARBRA KAY, AND CATHLEEN FINN, ACTING ON THEIR OWN BEHALF AND ON BEHALF OF MEMBERS OF THE ASSOCIATION,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS.

## REPLY BRIEF FOR PETITIONERS

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No. 94-749

# In the Supreme Court of the United States

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JOHN J. HURLEY, INDIVIDUALLY, AND THE SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,
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*v.*

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, AN UNINCORPORATED ASSOCIATION, BY AND THROUGH TIMOTHY DALEY, BARBRA KAY, AND CATHLEEN FINN, ACTING ON THEIR OWN BEHALF AND ON BEHALF OF MEMBERS OF THE ASSOCIATION,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS.

## REPLY BRIEF FOR PETITIONERS

As this Reply Brief will show, the Respondent's Brief misrepresents facts, misrepresents the record, and misrepresents the Veterans' case. This misrepresentation is crucial, because, as Respondents claim, this case turns on the facts. Resp. Br. 2. What the facts describe is a conflict between two sides: a longstanding private group that runs a parade, and a newly-formed group that has lately sought to use that parade to make its own statement.

As such, this is a case primarily about the First Amendment, as indeed the Veterans have argued from the beginning. As private actors, the Veterans have a First Amendment right to express anything they wish, without being forced by the government to express anything they do not.

GLIB has absolutely no claim on the Veterans' Parade since it could sponsor another parade at any other time, or on any other street in the City of Boston. In other words, it can have its own parade and offer its own message. The fact that GLIB has been largely successful in its state-compelled intrusions into the Veterans' Parade should concern all private sponsors of speech conducted in a public forum.

For forty-seven years, the Allied War Veterans Council of South Boston has organized and run a hugely popular but distinctly private parade in the neighborhood of South Boston. This is the Veterans' annual celebration commemorating St. Patrick, the Patron Saint of Ireland and the Archdiocese of Boston, and the British Evacuation of Boston in 1776.[1]

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[1] Evacuation Day is a limited Public Holiday, celebrated only in Suffolk County, Massachusetts. While the Respondent's Brief characterizes it as "a civic holiday centered on a municipal parade," (Resp. Br. 4), the city does not conduct any Evacuation Day activities, with the exception of allowing a day off for municipal employees. The Respondent does concede that "March 17, of course, also happens to be St. Patrick's Day." (Resp. Br. 3). Interestingly, Author Thomas O'Connor, Professor of History at Boston College, quoted in a Boston Globe article by Tom Coakley, Globe Staff, March 17, 1995: *Evolution of a holiday, Boston-style*, tells a different story of how the holiday evolved. Giving workers a day off for St. Patrick's Day would have violated church-state separation and the sensibilities of the Yankee establishment, he said. Therefore, "at a time where it would have been impossible to get a holiday to celebrate a Catholic saint, the way around it was to get a holiday for Evacuation Day. It was a political disguise." During the middle of the nineteenth century, an era when the Know-Nothing movement gained ascendancy in this country, Irish Catholics were openly prohibited from taking part in July 4th parades. In response, they formed their own parades, thus giving rise to thousands of annual St. Patrick's Day parades conducted throughout the nation. *See* Thomas Sowell, *Ethnic America*, Introduction and Chapter 1, "The Irish."

## I. Respondent's Assertion That the Veterans Are Merely Administering a Parade For the City Is Erroneous.

The central facts regarding parade ownership are resolved by the findings of the trial court, which the Supreme Judicial Court affirmed: (1) that the city's involvement in the Parade did not amount to state action; and (2) that the Veterans are private actors (Cert. Pet. App. B22).

Respondent apparently accepts these findings, but nonetheless insists on the fiction that the Veterans are merely administering the Parade on the city's behalf. "The Parade was once formally under the City of Boston's management." (Resp. Br. 4). "The Parade belongs, and has always belonged, to all citizens of Boston." (Resp. Br. 20). "[T]he City conducted [the Parade] for years and . . . the Council has more recently conducted [it.]" (Resp. Br. 31). "[T]he Council functions chiefly as the administrator of the event . . ." (Resp. Br. 32).

Respondent attempts to raise the state action issue through the back door (Resp. Br. 21-22 n.17), despite the fact that the law of the case foreciosed this issue. Not only did Respondent fully litigate this matter at trial, but the trial judge found against GLIB on state action. When the Veterans appealed the case to the Massachusetts Supreme Judicial Court, Respondent's brief, dated March 2, 1994, stated that the "Court should deny the Veterans Council appeal and affirm in all respects the ruling of the trial Court below." (Appellees' Brief at 35). When GLIB broached the issue of state action in its Reply Brief to the Supreme Judicial Court, the Court summarily rejected it. *Irish American Gay, Lesbian and Bisexual Group of Boston* v. *City of Boston*, 418 Mass 238, 245 n.12, 636 N.E. 2d 1293, 1297 n.12 (1994). Nor was it among the Questions Presented in the Petition for Certiorari in this case.

In any event, the major difficulty with Respondent's misleading argument is that it is carried on the shoulders of apoc-

rypha and anecdote. The city's position regarding parades was described by Assistant Corporation Counsel McKelway at trial: "The City is not in the business of running parades and there will be testimony that, of the approximately two hundred parade permits issued annually by the City, there is only one that the City actually runs and that is the Fourth of July Parade. It is not the St. Patrick's Day parade. The Veterans have run that parade for at least forty-seven, maybe forty-eight years now." ( Tr. p. 38).

Additionally, city attorney McKelway read into the record of the trial the response of the Mayor of the City of Boston, Raymond Flynn, to an interrogatory submitted by Petitioners regarding ownership of the parade. The Mayor responded:

> To the best of my knowledge, the Allied War Veterans Council plans, organizes, administers, coordinates, promotes, publicizes, and executes the Evacuation Day/St. Patrick's Day Parade. The city's function in relation to the parade from 1990 to 1993, as with all other private parades, was to ensure that the event is properly permitted through the Department of Transportation and to engage in appropriate action to protect the public safety through the Police Department, Fire Department, Department of Health and Hospitals, and the Public Works Department.

Tr. 472-473.

The uncontroverted facts in this case are that the city of Boston issues between two hundred and two hundred and fifty parade permits each year to private groups in the city of Boston. Tr. 182. The permit issued to the Veterans is but one of many issued to private parties to celebrate various occasions.

GLIB had a full and fair opportunity to explore its unsupported assertion in the lower courts. City defendants were

available to substantiate or deny this belief, and to subject themselves to questioning under oath as to the truthfulness of their testimony. GLIB did not question the mayor, the licensing authority, the Veterans, nor the police department with regard to this point. We have no idea what Mayor Curley said almost a half century ago, or whether the city even issued permits during that period. He purportedly gave permission to the Veterans to run the Parade. However, today, when a group wishes to conduct a parade, an application for a permit must be made to the Boston Transportation Department. Tr. 183.

If there is an agreement between the city and the Veterans to have the Veterans administer this parade, no rationale for this venture has been offered by Respondent. Moreover, it is ludicrous to suggest that the Veterans would wage a costly three-and-a-half-year campaign to retain control of their Parade if they or the city had an agreement that the Veterans only administer this event on the city's behalf. Were that the case, it is far more likely the Veterans would simply have said to the city, "You run your parade and we'll run ours," or alternatively, the city would likely have said to the Veterans, "You are hereby disfranchised." It is that simple. It is utterly illogical to accept the Respondent's position, and there is no evidence in the record to suggest that the city of Boston and the Veterans engaged in a scheme to exclude GLIB from the Veterans' Parade.[2]

Lastly on this point, in the hope of showing a nexus, GLIB hopes to attach significance to the fact that March 17th is Evacuation Day, and that over the years the governor of the Commonwealth has issued a proclamation to honor the occa-

[2] As noted by Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. REV. 791, 866-67 (1993), "It can scarcely be denied that the mayors in both cities [Boston and New York] have used their good offices in a genuine effort to bring ILGO and GLIB into the fold . . . I hesitate to say that . . . Ray Flynn . . . committed the very discriminatory actions [he] worked so hard to avert. I certainly would conclude that Dinkins and Flynn were

sion. Resp. Br. 10. A ceremonial Proclamation encouraging citizens to celebrate a particular holiday carries no force of law for the citizenry of Massachusetts. Moreover, in recent times the St. Patrick's Day Parade has been held on the Sunday closest to March 17th, and thus never on the public holiday that commemorates Evacuation Day. As the court ruled in *Gay Veterans Ass'n, Inc.* v. *American Legion*, 621 F. Supp. 1510, 1517 (S.D.N.Y. 1985):

> Plaintiffs argue that the American Legion Parade is a public forum because its purpose is to celebrate a public holiday, Veterans Day, on a public street. This, however, does not turn a private parade into a public forum. Under New York law, the sponsorship of parades to celebrate Veterans Day is not an exclusively public function.

The Petitioners are not custodians of a public celebration in any sense. They are not designees of the city, nor do they exercise their constitutional rights at the public's pleasure. Contrary to GLIB's assertion, and notwithstanding conclusory statements in Professor Yackle's law review article regarding detailed participation by the city,[3] the record simply does not support the claim that the city ever conducted or managed the St. Patrick's Day/Evacuation Day Parade.

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responsible for what happened in the practical sense that they failed to do all they might have to change the result. Yet, current state action doctrine would presumably find that argument insufficient."

[3] Professor Yackle is on the Respondent's Brief in this case. His law review article was submitted in draft form to the trial court at the end of the trial in this case along with GLIB's Proposed Findings of Fact and Conclusions of Law.

## II. GLIB Has a Message. The Veterans Object Not to GLIB's Members' Sexual Orientation But to Their Message.

> The argument on this point may sound like double-talk on first hearing, but there is some substance to the claim that the exclusion of gay and lesbian *groups*, as opposed to individual homosexuals marching with other units, is not discrimination on the basis of sexual orientation at all, but rather is discrimination on the basis of the point of view that ILGO and GLIB represent. Those organizations do have a message of their own, namely the message that forms their raison d'etre. . . . [I]n this particular First Amendment context, where speech claims are set over against each other, it seems perfectly reasonable, even essential, that those who command the public forum be permitted to bar those with conflicting views.
>
> Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. REV. 791, 851 (1993).

In its Brief, Respondent claims that "the message [GLIB] wish[es] to convey by participating in the Parade is simply the existence of gay men, lesbians, and bisexuals as part of the Irish-American community." Resp. Br. 30 n. 21. Respondent concedes that "GLIB . . . would have contributed a message if it had been allowed to participate." *Id.* at 32. However, there is no need to rely on hypothetical assurances of GLIB's communicative purpose. The simple fact is that GLIB did participate under its own banner in both the 1992 and 1993 Parades. The banner proclaimed and celebrated GLIB's pride in its dual heritage: "Irish-American Gay, Lesbian and Bisexual

Group of Boston" adorned with green shamrocks enclosing pink triangles. (J.A. A67; Ex. 84 videotape of 1993 Parade). GLIB had expressive purposes, as found by the trial judge. (Cert. Pet. App. at B3, C5.) It celebrated its "diversity," regardless of how that fit into the Veterans' celebration. It is a "diversity" that oddly enough seeks forced inclusion. Judge Flannery, equating GLIB's messages and values, *i.e.*, its viewpoint, with sexual orientation, ruled: "A proper celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness," (Cert. Pet. App. at B24), and that "Inclusiveness should be the hallmark of their Parade." *Id.* at B28.

The Respondent admitted through its lead counsel at trial: "We will also show that the thrust of the action by the Veterans and the city is not to make a determination of GLIB as an organization or to criticize GLIB. The thrust of this is to preclude GLIB's message from being heard either in Boston or elsewhere." (Tr. 26-7).

Still, GLIB contends that the Veterans merely have "to allow GLIB marchers to march while self-identifying as lesbians, gay men or bisexuals by means of a banner." Resp. Br. 28. As Nan D. Hunter, a lesbian scholar, wrote:

> The idea of identity is more complicated and unstable than either simply status or conduct. It encompasses explanation and representations of the self. Self-representation of one's sexual identity necessarily includes a message that one has not merely come out, but that one intends to be out — to act on and live out that identity. Notions of identity increasingly form the basis for gay and lesbian equality claims. Those claims merge not only status and conduct, but also viewpoint, into one whole. To be openly gay, when the closet is an option, is to function as an advocate as well as a symbol.

*Identity, Speech and Equality*, 79 VA. L. REV. 1695 (1993).[4]

Judge Flannery equated GLIB's message with the sexual orientation of its members. "GLIB would be excluded because of its values and its message, *i.e.*, its members' sexual orientation. Tr. of Closing Arg. at 43, 51-52 (Nov. 23, 1993)" (Cert. Pet. App. at B4 n. 5). As the transcript references in the trial court's opinion make clear, the Veterans freely admitted that they were discriminating against the messages and values of GLIB, *i.e.*, its viewpoint. But the equation of its message with its members' sexual orientation was an error of law. The trial judge stated: "Excluding all sexual themes not only contravenes the First Amendment prohibition on content-based restriction — but is a form of discrimination itself." *Id.* at B4 n. 6. This collapsing of the distinction between the message and the messenger is a critical error. For all the Veterans knew, and for all they cared, heterosexual members or sympathizers of GLIB could be marching behind GLIB's banner, since membership in GLIB depended on support for its goals. Tr. 98. Even if all the marchers behind GLIB's sign were "straight," however, the exclusion of the group would still legally be discrimination on the basis of sexual orientation, under the trial judge's reasoning.

---

[4] From quite a different perspective, Oxford scholar John Finnis noted that "[t]he phrase 'sexual orientation' is radically equivocal. Particularly as used by promoters of 'gay rights,' the phrase ambiguously assimilates two things which the standard modern position carefully distinguishes: (I) a psychological or psychosomatic disposition inwardly orienting one towards homosexual activity; (II) the deliberate decision so to orient one's public behavior as to express or manifest one's active interest in and endorsement of homosexual conduct and/or forms of life which presumptively involve such conduct." Finnis continues: "It is also widely observed that laws or proposed laws outlawing 'discrimination based on sexual orientation' are always interpreted by 'gay rights' movements as going far beyond discrimination based merely on A's belief that B is sexually attracted to persons of the same sex. Instead (it is observed), 'gay rights' movements interpret the phrase as extending full legal protection to public activities intended specifically to promote . . . homosexual conduct." Law, Morality and "Sexual Orientation," 69 NOTRE DAME L. REV. 1049, 1053-54 (1994).

Respondent's Brief makes much of the Veterans' reasons for not allowing GLIB to march, reasons which the trial judge deemed pretextual. "Only when the 'sexual themes' rationalization collapsed as well, did the Council develop the First Amendment argument pressed here," (Resp. Br. at 13), implying that the First Amendment was simply a pretext for discrimination, lately developed by the Veterans. Professor Yackle's article, however, clearly recognized that the Veterans had relied early in 1992 principally upon the First Amendment in rejecting GLIB:

> [T]he Veterans declared that the 'principle' [*sic*] reason for excluding GLIB was that the inclusion of [GLIB] was 'not consistent' with the Veterans' own views, 'embodied in their parades'. . . . In this last, of course, the Veterans asserted their own First Amendment right to use the parade to advance a private agenda, and within that argument, effectively claimed that they need specify no particular message other than what was implicit in ad hoc decisions to include some groups and exclude others.

Yackle at 844.

Indeed, the Veterans' exclusion of sexual themes was nothing other than a First Amendment argument that they — not the government — should control the content of their own speech. Judge Flannery considered it pretextual, but his reasoning underlying that determination was clearly erroneous, since it was premised on a mistake of law: that a privately-organized event cannot exclude sexual themes consistent with the First Amendment. Cert. Pet. App. at B4 n.6. The trial judge had literally turned the First Amendment on its head.

The trial judge did the same with the Veterans' expressed concerns about the GLIB members' associations with ACT-UP

and Queer Nation (Tr. 316),[5] finding there was "no basis for concluding that GLIB's participation would incite imminent lawlessness," citing *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). As a private actor, the Veterans' Council did not have to meet the First Amendment's standards binding government, since the judge had found that there was no state action. Once again, the finding of pretext was based on an error of constitutional law. The Veterans' Council is the beneficiary of the First Amendment, and not its victim.

## III. The Veterans Know What They Do Not Want to Say Through Their Parade, and They Have Decisively Acted Accordingly.

> The freedom to speak one's mind includes, in turn, the freedom to hold one's tongue. For the freedom "not to speak publicly" serves "the same ultimate end as freedom of speech in its affirmative aspect." The freedom to speak or not to speak includes, as well, the freedom to decline to mouth the messages of others. When government mandates "speech that a speaker would not otherwise" utter, it "necessarily alters content." The First Amendment thus protects

[5] Barbra Kay admitted at trial that she was a member of Queer Nation when applying to march in the Parade and that she was named in periodicals or newspapers as having called Cardinal O'Connor a homophobe. Tr. 92. "Kay herself made no secret of her association with Queer Nation." Yackle, *Parading Ourselves*, 73 B.U. L. REV. 791, 840 (1993). Respondent's Brief characterizes this concern of the Veterans as "suspicions that some members of GLIB were also members of ACT-UP and Queer Nation" (at 39). Parade official Thomas L. Lyons testified as to his concern about people from the protest at Holy Cross Cathedral in the South End participating in the Parade. Tr. 272. "In the summer of 1990, ACT-UP/Boston disrupted the ordination of several young priests at the Holy Cross Cathedral in the South End. The protestors staged a mock gay wedding, shouted vulgarities, and threw condoms at priests and their families." Yackle, *Parading Ourselves* at 838.

> citizens from being punished for failing to endorse an ideological cause for which they have no sympathy, and, accordingly, refusing to enhance "the relative voice" of "opponents."

Yackle, *Parading Ourselves* at 802-03.

The whole point of the Veterans' Parade is to celebrate St. Patrick's Day and the British withdrawal from Boston. Most of the time, the Veterans have had no problem with would-be participants in their Parade. A marching band of bagpipers requires little analysis.

On occasion, however, groups have participated bearing messages the Veterans judged inappropriate for their parade. When a local anti-busing group applied to march in the 1970s, the Veterans said no. J.A. A86. When an anti-abortion group applied to march in the late 1980s, the Veterans circumscribed their message. J.A. A92-93. When NORAID wanted to march, the Veterans also modified its message. J.A. A93. When the Ku Klux Klan applied to march in 1993, the Veterans said no. J.A. A92. When a truck with anti-gay signs tried to enter the 1993 Parade, the Veterans said no to them, too (J.A. A79, A91), even though the courts had forced the Veterans to include a message proclaiming homosexuality which the Veterans disagreed with.[6]

Incredibly, the Supreme Judicial Court found "no legal relevance of this fact to the findings of the judge or to the conclusion we reach." *Irish-American Gay*, 418 Mass. at 244 n.10, 636 N.E.2d at 1296 n.10. But these exclusions were clearly relevant

[6] Respondent's Brief makes much of the supposed state of mind of Petitioner Hurley in excluding GLIB (Resp. Br. 41-43), and attempts to wrap itself up in that subjective finding based on the credibility of Mr. Hurley. *Id.* at 43-45. But Mr. Hurley's testimony was that he was just one vote on the Veterans' Council (J.A. A93), and that the vote to exclude GLIB was unanimous. J.A. A86. In any case, the only discriminatory intent he manifested at trial was discrimination against GLIB's messages and values, and that is constitutionally protected for a private actor.

to the Veterans' expressive purpose, whether the Parade was open to the general public, whether the Veterans exercised control and selectivity over their Parade or were simply "conduits" for the general public, and whether they shaped the Parade's message. Further, the exclusion of the truck with anti-gay messages was clearly relevant to the issue of discrimination on the basis of sexual orientation, and the issue of "pretext,"[7] especially since the Veterans' exclusion of sexual themes was judged to be pretextual. Conveniently, when GLIB states in its Brief that "this purported criterion finds virtually all messages and identifications acceptable, except for GLIB's identifying banner, which is unerringly singled out for exclusion," (Resp. Br. 30), it overlooks the telling exclusion of the anti-gay truck from the Parade.

Like the state courts, the Respondent was apparently unimpressed by this consistent track record: "The occasional exercise of selective judgment does not, however, establish a pattern of selectivity that would seriously fortify the [Veterans] Council's argument here." Resp. Br. 33-34 n.24. The most obvious response is that the Veterans have exercised their rights as parade organizers to exclude groups and messages whenever necessary. Problems haven't arisen that often, so the Veterans haven't had to make many message-based exclusionary judgments.

Respondent's Brief also raises the specter of racial or religious discrimination if the Veterans' position were upheld (Resp. Br. 24, 29). However, the NAACP marched in the

[7] Judge Flannery was careful to note in his opinion that neither the Ku Klux Klan nor ROAR were protected under the public accommodation law. Cert. Pet. App. at B7. If the pro-gay sign must be included in the parade, what about the truck with the anti-gay sign? Arguably, of course, by making a "distinction" in a place of public accommodation on the basis of sexual orientation, it should be banned. But by that test, applied in a viewpoint-neutral and content-neutral way, as it must, GLIB's own sign makes such a "distinction." Section 98. Thus the overbreadth of the public accommodation statutes, as interpreted by the Massachusetts courts, is illustrated.

Parade in the 1960s (J.A. A102); and a Protestant Bible Trolley makes an annual appearance. Pet. Br. 14 n.5. Individuals are not discriminated against on the basis of race, sex, religion or sexual orientation in this Parade.[8] However, groups with messages of their own are subject to the approval of the parade organizers. The Veterans did not exclude the NAACP. It is doubtful, however, that they would have admitted the Black Panthers.

GLIB argues that "[p]resumably, the manager of Ollie's Barbeque [*sic*] had a point of view about serving African-Americans," citing *Katzenbach* v. *McClung*, 379 U.S. 294 (1964). The manager of Ollie's Barbecue was not engaged in an expressive activity. He was engaged in the business of selling food. If the patron tried to get into the kitchen and add to the menu, or posted a sign on the front door without the proprietor's permission, or started making a speech once inside the restaurant, the analogy would be more apposite.

The sponsors of a parade have the right under the First Amendment to exclude any self-identifying group that it feels is not compatible with their parade, whether the identification is religious, ethnic, or anything else. If the Veterans wanted to exclude, for instance, a club such as the English Union or a group proclaiming that they are Japanese Buddhists, or Irish Pantheists, or the Aryan Worshippers of Odin, because the identification sends a message incompatible with their own theme or message, this would certainly be their right. And if a self-identifying banner also proclaims a life-style that is inconsistent with the sponsor's own themes, the First Amendment right to exclude should be obvious. People cannot constitutionally be compelled to provide a platform for messages they disagree with.

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[8] In this regard, it should be noted that openly gay city councilor David Scondras had marched in the Parade. Tr. 33. Yackle, *Parading Ourselves* at 836 n.208.

## IV. The Statute As Interpreted, and the Injunction Applying It, Directly Burden Speech.

Once a statute or regulation targeted at discrimination in a place of public accommodation is applied to a parade organized by private sponsors, the First Amendment is necessarily and directly implicated. Of course, all types of protected speech could be curtailed on the streets under the the pretext of protecting some public good or advancing some public interest, and for this reason such attempts have been regularly struck down. *See Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 152 (1969); *Cox* v. *Louisiana*, 379 U.S. 536, 554-57 (1965); *Invisible Empire of the Knights of the Ku Klux Klan* v. *Mayor of Thurmont*, 700 F. Supp. 281, 286-87 (D. Md. 1988); *Collin* v. *Smith*, 578 F.2d 1197, 1201 (7th Cir. 1978); *Forsyth County* v. *Nationalist Movement*, 112 S. Ct. 2395 (1992).

Strict scrutiny obviously applies because this case involves the Veterans' speech, as well as their right to be free from compelled speech. Because the trial court equated messages and values with sexual orientation, and the Supreme Judicial Court affirmed that equation, the public accommodation law now prohibits discrimination on the basis of message in a privately organized, privately financed, permitted parade. As such, the public accommodation law triggers strict scrutiny. The injunction, in requiring that the Veterans not exclude GLIB from marching in the parade on the basis of sexual orientation under the usual terms and conditions, meant beyond cavil that GLIB's messages were to be included, given that the trial court equated sexual orientation with GLIB's messages and values. If the celebration or proclamation of homosexuality is deemed by parade organizers to be inconsistent with the organizers' traditional religious and social beliefs, then a law compelling the parade organizers to include this message as part of their expression must be subject to strict scrutiny. Moreover, such compelled speech has been found by this court to be unconstitu-

tional. *Wooley* v. *Maynard*, 430 U.S. 705 (1977); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 536 (1980); *Pacific Gas and Electric Co.* v. *Public Utilities Comm'n*, 475 U.S. 1, 12 (1986) ("*PruneYard* thus does not undercut the proposition that forced associations that burden protected speech are impermissible.")

It would be ironic if those expressing hate messages had their day on the streets, but those celebrating and affirming their traditional religious and social values were excluded, or worse, subjected to a governmental system that required them to explain, justify, or rationalize their beliefs to a doubtful, suspicious, sarcastic, or oppressive authority — whether that authority came in the form of the courts, or from a licensing authority.[9]

Unfortunately, in the Veterans' case, their desire to run a traditional parade conflicted with the political agenda of others who saw in the parade an opportunity to advance their own cause on the streets of South Boston. The strategic importance of the political statement was best summarized by Professor Yackle. "The parade," Prof. Yackle wrote, "plainly reflects

[9] This is what at least one of the co-signers of the Respondent's brief has suggested: "I will urge city officials in New York and Boston to take responsibility for planning and conducting these two great street parties and, in so doing, to ensure both that all members of the community may attend and that anyone who wishes by attending to express a message is free to do so. Concomitantly, city authorities should weed discriminatory features out of their existing schemes for dispensing permits for privately sponsored parades. Such permits should be freely distributed to competing groups, whose messages should be considered only to promote expression. Officials should try to accommodate a group's special interest in a particular street or date, but should not be obliged routinely to turn major arteries over to private processions. When the precise character of a message warrants it, city officials should exempt a parade from the local anti-discrimination ordinance. If a group seeks such a dispensation, it should be invited to explain how its compliance with the anti-discrimination law would dilute its message, and city officials should make that explanation known to the public. As a general matter, then, city officials should take parade cases as they come — attempting to be genuinely neutral with respect to permit applicants, but recognizing that the proper result in a case often requires an investigation of the facts and hard judgment. Suffice it to say, I think the Constitution should be read to endorse this practical approach." *Yackle*, *supra* at 796.

the larger social and political developments currently under way and must be seen in that overarching context along with other related flashpoints — gays and lesbians in the military, same sex marriages, dependent benefits for gay partners — and dozens of others."

This case presents a viewpoint discrimination problem similar to that in *R.A.V.* v. *City of St. Paul*, 112 S.Ct. 2538 (1992).

> Displays containing some words — odious racial epithets, for example — would be prohibited to proponents of all views. But [other words] would seemingly be usable *ad libitum* in the placards of those arguing in favor of racial, color, etc. tolerance and equality, but could not be used by that speaker's opponents . . . [The government] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.

*Id.* at 2547-49. Interestingly enough, one of GLIB's amici argues that "a gay and lesbian pride parade may exclude those bringing a message of antipathy towards lesbians and gay men," because "their participation would conflict with the expressive purpose of the parade."[10] Anti-Defamation League Br. 11. Respondent argues that, "[b]y its own submissions, the Council has not had, and does not have, an 'anti-gay' message to convey" (Resp. Br. 34 n. 25), and thus cannot justify GLIB's exclusion on that basis. In other words, if the Veterans' Parade were truly hateful towards gays and lesbians, they could then exclude GLIB. That First Amendment protection should depend upon being hateful as opposed to remaining silent, all under the

[10] Cathleen Finn, a member and spokesperson of GLIB who testified at trial, stated that "if a group was not going to participate in the spirit of gay pride and in the gay pride parade, they shouldn't be allowed to participate." Tr. 134.

pretext of vindicating anti-discrimination law, is truly mind-boggling. The rule GLIB proposes is, in effect, you cannot discriminate against gay pride messages unless you are really hateful. In any case, the public accommodation law cannot be allowed to trump the First Amendment.

In sum, GLIB's position invites continual litigation about every privately-sponsored parade. Professor Yackle has written that "extant constitutional doctrine does not generate a clear answer, but only beckons a difficult exercise in balancing — in every case and in every year." Yackle, *Parading Ourselves* at 868. Without a reversal of the lower courts' decisions in this case, the Veterans' Council will be compelled to either 1) silence its voice, as in 1994; 2) conduct future Parades with the governmentally enforced inclusion of a message and viewpoint favored by the state, as in 1992 and 1993; or 3)submit its claim that it has reformulated the Parade into a protected expression to a judge for his or her approval, as in 1995. Based on the record in this case, the Petitioners ask for a resounding and categorical First Amendment ruling that will protect privately organized parades from governmental control of content.

> A parade "falls within the sphere of conduct protected by the First Amendment." Indeed, one can scarcely imagine a more definitive and graphic way for a citizen to manifest himself to the world than to march down the street, arm-in-arm with friends and neighbors, displaying his allegiances for all to see. To abandon the anonymity of the crowd and take a place in the lists is to affirm as few other actions can the ideas and people one calls her own. To parade is to proclaim who, what, and of what you are — to identify yourself with a community of thought and comradeship in the most elemental sense.

Yackle, *Parading Ourselves* at 797.

## Conclusion

For these reasons and those stated in our opening brief, the judgments and orders of the Massachusetts Supreme Judicial Court and the Superior Court should be reversed and vacated.[11]

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[11] Contrary to Respondent's assertion that the Massachusts courts "got it right," (Resp. Br. 48), and that their judgment should be affirmed, Petitioners list some of the more egregious errors in these decisions:

A. Dismissing the Veterans' stated expressive purpose of celebrating their religious and social values.

B. Equating a message with people's sexual orientation.

C. Ruling that a private event cannot exclude sexual themes, and that it is discrimination under the statute to do so.

D. Attributing the unanimous decision of the Veterans' 60-man Council to exclude GLIB solely to John Hurley, and imputing Hurley's alleged discriminatory intent to the whole Council.

E. Ruling that an expressive event, such as a parade, had to be sufficiently focused to get First Amendment protection.

F. Determining that the fact that the Veterans had excluded other groups and messages from their Parade in the past was irrelevant.

G. Declaring that one has the burden of first proving a First Amendment right in order to be protected from the forced showcasing of another's unwanted message.

H. Classifying an expressive event as an association, and applying the criteria of membership organizations to a parade.

I. Stating that the Parade "simply has not been [a protected First Amendment activity] *in the past* and is not one now" (emphasis added) when the court had no significant record of the 45 other parades the Veterans ran prior to 1992. Cert. Pet. App. at B25 n.27.

Supreme Court, U.S.
FILED
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No. 94-749

In The

# Supreme Court of the United States

October Term, 1994

JOHN J. HURLEY, Individually and the SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,

*Petitioners,*

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, An Unincorporated Association By and Through TIMOTHY DALEY, BARBRA KAY, and CATHLEEN FINN, Acting On Their Own Behalf and On Behalf of Members of the Association,

*Respondents.*

**On Writ Of Certiorari To Supreme Judicial Court Of The Commonwealth Of Massachusetts**

## AMICUS CURIAE BRIEF ON BEHALF OF PETITIONERS

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Citations marked A, followed by a page number, refer to Judge Duffy's decision in the New York *AOH v. Dinkins* case attached to the Petition for Certiorari.

Citations marked B, followed by a page number, refer to the decision of the Superior Court, attached to the Petition for Certiorari.

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Citations marked C, followed by a page number, refer to the decision of the Supreme Judicial Court for the Commonwealth of Massachussetts.

Citations which begin with TR refer to the Trial Transcript.

## CATHOLIC WAR VETERANS OF THE UNITED STATES OF AMERICA, INCORPORATED MEMORANDUM OF LAW AMICUS CURIAE IN SUPPORT OF APPELLANT'S MEMORANDUM OF LAW

### INTEREST OF AMICUS PARTY

The Catholic War Veterans of the United States of America, Incorporated is a non-profit war veteran's organization incorporated under the laws of the State of New York in 1935, and chartered by the Congress of the United States on August 17, 1984. Its enumerated purposes, include, inter alia (a) to "preserve and protect and defend the Constitution of the United States . . . ". (b) "Commemorate" the wars of the United States, and the veterans who participated, live or dead; (d) Cooperate with other Veteran organizations in "common projects"; (j) "Encourage morality in . . . social, fraternal and all other phases of American life; (k) Promote the realization that the family is the basic unit of society; (l) "Increase our love, honor, and service to God . . . ".

In carrying out these purposes, the Catholic War Veterans sponsor or take part in, inter alia, public parades, processions, ceremonies, and memorial rites, often on public streets, and other public fora. Therefore, this case would not only impact on the public activities sponsored or participated in by this organization, and its First Amendment rights, but on the above enumerated purposes of this organization.

### STATEMENT OF THE CASE

The decision of the Superior Court of the Commonwealth of Massachusetts, which was upheld by the Supreme Judicial Court of the Commonwealth, compelled the petitioners, South Boston Allied War Veterans Council, to include the Irish-American, Gay, Lesbian and Bisexual Group of Boston, along with their identifying banner, into their privately-sponsored

St. Patrick's Day/Evacuation Day Parade. As a result, the Veterans cancelled their 1994 parade and now appeal this decision. This "amicus" party adopts the statement of facts, and laws and statutes involved, as set forth in the appeal brief of the attorney for the South Boston Allied War Veterans Council.

The decision of the Massachusetts courts held that the Veteran's Parade had no expressive purpose, and so their speech was not involved. They then stated that the parade was "an open recreational event subject to the public accommodation law," *South Boston Allied War Veterans Council, et al. v. The City of Boston, et al.* (C9).

Despite the undisputed fact that GLIB's purpose for marching was to communicate their messages to the public in the Veterans' privately-sponsored parade, and against their wishes, the Massachusetts courts ruled that speech was not an issue here. The Superior Court decision handled this objection by just completely ignoring it. The Supreme Judicial Court did take note of it, but in a footnote (C14, footnote 19), dismissed its First Amendment implications based on two assumptions. It assumed that the First Amendment applied only if the objecting party had speech of their own which they wanted to express, and not solely an objection to showcasing another's unwanted message. They also assumed that somehow a public accommodation law car impose and mandate unwanted speech on an unwilling party, whereas a motor vehicle law cannot.

The Massachusetts courts also ruled that the Veterans had discriminated against respondents because of their sexual orientation. No evidence was ever presented, and there is none in the record, that in the forty-seven-year history of the parade the Veterans ever excluded any person based on his or her sexual orientation. Both Massachusetts courts attempted to get around this basic problem by stating that the Veterans' objection to GLIB's message constituted discrimination based on the sexual orientation of its members.

Finally, the Massachusetts courts bypassed the issue of free speech, and viewed this case as only involving freedom of association. As the dissenting opinion of the Supreme Judicial Court said, "As discussed above, the Veterans Council organizes the parade for expressive purposes: to entertain the hundreds of thousands of spectators who view the parade each year in celebration of St. Patrick's Day and Evacuation Day" (C23). These were the two themes and messages that the Veterans wished to express and celebrate by their parade – St. Patrick's Day and Evacuation Day – and the entertainment was the manner in which those themes were celebrated and expressed. But Judge Flannery's decision regarded the parade as akin to a social association such as a dance hall, (B24) or an expressive association (B25) (which apparently had no expressive purpose), rather than the association's expressive activity and speech. In doing so, he applied the criteria judging the right of a membership association to exclude applicants, rather than considering the First Amendment protection given to expressive activities and speech itself. This application of freedom of association criteria to a membership organization was criticized as flawed in the dissenting opinion as follows:

> "Infringements on the right not to associate are examined under strict scrutiny; 'Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.' *Roberts v. United States Jaycees, supra,* and cases cited. It is established, however, that, '[i]f a club seeks to exclude individuals who do not share the views that the club's members wish to promote,' the law may not require association."

To reiterate, the Veterans Council is the association, and the parade is their expressive activity – their speech. But even viewed as an association, the dissent noted that an association

may not be forced to either associate with or to showcase another party's ideas or messages to which it objects, or accept members that may impair the ability of the original members to express only those views that brought them together [see C21, C22 and C23].

## ARGUMENT

## POINT I

### THE VETERANS' PERMITTED PARADE HAD A THEME AND MESSAGE, AND WAS PROTECTED SPEECH.

Basically, the same questions that are involved in this action were decided in *New York County Board of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358 (S.D.N.Y. 1993). In that case a homosexual group, "Irish Lesbian Gay Organization" (ILGO) applied for permission to march in New York's annual St. Patrick's Day Parade with their banner. They were refused admission by the AOH, the parade's sponsor and organizer, although the AOH maintained that individual members of ILGO could march in the parade *without a banner* as guests of various parade contingents (p. 362 of AOH decision, supra, and A9).

Eventually the case ended up in the United States District Court, where the Court ruled in favor of the AOH on the grounds that their First Amendment rights would be violated if they were compelled to include ILGO in their parade, and that a parade, as a form of speech or expression, cannot be a public accommodation.

The Court's decision in the aforementioned *AOH* case, supra, noted that the New York City Human Rights Commission did not cite a single case that held a parade to be a public accommodation. The Court said:

> "It is interesting to note that in determining the question as to whether a parade can be a "public

> accommodation," neither the Administrative Law Judge nor the New York City Human Rights Commission makes any reference to a judicial or administrative opinion in a case involving parades." (Id. at 364, and A13).

It is also interesting to note that Judge Flannery's decision also does not cite a single case holding that a parade is a public accommodation.

This question as to whether a private parade can be a public accommodation was, as previously stated, answered in the negative by the Federal District Court in the aforecited *AOH v. Dinkins* case. In so ruling, the Court made a detailed analysis of the leading cases in this area, as follows:

> "The main problem with the logic of the decision of the City's Human Rights Commission is that it starts the analysis at the wrong end. The first question that should have been considered is not whether the New York St. Patrick's Day Parade is a public accommodation, but whether the Parade and its message constitutes speech protected by the First Amendment guarantees of Freedom of Speech. Insofar as a parade constitutes protected free speech, it cannot be a public accommodation.
>
> "A parade is, by its nature, a pristine form of speech. *See Perry Educ. Assoc. v. Perry Local Educator's Assoc.*, 460 U.S. 37, 45 (1983); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969); *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965); *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 286-87 (D. Md. 1988). In parades, people gather together for the purpose of expressing their message. *See id.* The public thoroughfares of our nation are the public fora in which the issues of the day can be debated and where individuals seek to engage in basic expressive activity, such as parading. *Id.; Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (citing *Police Department of Chicago v. Mosley*, 408

U.S. 92, 94-96 (1972); *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939). *Every parade is designed to convey a message. Id.* As such, a parade organized by a private sponsor is the quintessential exercise of the First Amendment right of freedom of expression. *Id.* (Emphasis added).

"The First Amendment guarantees an individual the right to free speech, 'a term necessarily comprising the decision of both what to say and what not to say.' *Riley v. Nat'l Federation of the Blind of North Carolina*, 487 U.S. 781, 796-97 (1987). In exercising this right the message intended to be conveyed by a parade sponsored by a private organization is to be determined by the parade sponsor and not by the state or the city. *See Grayned*, F.2d 1197, 1201 (7th Cir., *cert denied*, 439 U.S. 916 (1978); *Invisible Empire*, 700 F. Supp. at 286-87. To hold otherwise would give local government the right of censorship over the thoughts and speech of the people. *Id.;* see also *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 10-11, 15-17 (1986) (state could not compel company to include in its billing a third party's message it disagreed with); *Wallace v. Jaffree*, 472 U.S. 38, 48-55 (1985) (First Amendment adopted to curtail power of Congress to interfere with individuals' freedom to "express himself in accordance with the dictates of his own conscience"); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (forcing newspapers to print candidates' replies to editorials is an impermissible burden on editorial control and judgment); *Sherber v. Verner*, 374 U.S. 398, 402 (1963) (government may "not compel affirmance of a repugnant belief . . . nor penalize or discriminate against individuals or groups because they hold views abhorrent to the authorities"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1934) (state has no

power to force individual to profess any statement of belief)." (Id. at 366 and 367, A18,19).

This decision by Judge Duffy, and the supporting cases, make it clear that every parade expresses a message of some sort, and every parade is a pristine form of speech. As such, parading is a "basic expressive activity," and "a parade organized by a private sponsor is the quintessential exercise of the First Amendment right of freedom of expression."

To arrive at their decision that this Parade was not an expressive activity, but rather a public accommodation, the Massachusetts courts ruled that the Veterans' Parade had no expressive purpose, and so was not protected speech. However, the very name of the Parade expresses its message and theme. Its expressive purpose was to celebrate St. Patrick's Day and Evacuation Day, and what these events meant to them. Its theme and expressive purpose was obviously to honor St. Patrick, and celebrate those cultural, religious and patriotic themes indicated by the very name of the Parade. The Massachusetts courts closed their eyes to this obvious expressive purpose by examining the makeup of the individual units marching. They acted like the blind men who were asked to describe an elephant. One, grabbing the tail, said it was a snake. Another, grabbing its leg, said it was a tree. Another, feeling its side, said it was a wall. Another, touching its tusk, said it was a spear, etc. Of couse, it was an elephant. Like the blind men, the Massachusetts courts refused to look at the Parade as it was, but analyzed its components in order to avoid admitting what it was: an expressive activity celebrating stated themes. This, of course, is protected speech. The Massachusetts courts, however, refused to recognize the forest because the leaves were in the way.

The fact that there is diversity in a parade does not mean that the public at large can participate, or that the Veterans do not exercise their right to select or reject applicants. Nearly all parades are composed of diverse groups of marchers who are representative of different organizations. However, on the occasion of the parade, they are all participating in the theme and expressive purpose of the parade. And it is the parade's sponsors who have the right to determine that theme, its

meaning to them, what messages are in harmony with it, and its composition – not the state. In doing so, the parade's sponsors have the right to exclude any group that the sponsors believe send a message contrary to their own theme or message, or who detracts from it, or which is just unwanted. And they should have the right to do so without being hauled before a court or state agency and forced to explain or justify their speech and expressive activities.

Judge Flannery's decision states: "Participation in the Parade is not limited on the basis of similarity of viewpoints" (B24), a justification echoed by the Supreme Judicial Court (C7). His statement is ambiguous, if not misleading, and is completely irrelevant. Viewpoints about what? No parade is composed of marchers who all have uniform interests in their daily lives, or have similar viewpoints on all the issues of the day. If this was a litmus test, then no parade would have First Amendment protection, except perhaps a KKK parade. If this was a criterion, then no expressive activity, including most parades, would have First Amendment protection. To have First Amendment protection, all parades would have to be a March of the Clones, or at least a March of the Clans.

What is relevant here is not whether a parade is composed of units from various sections of the community, but whether these units send out a message that the sponsors who shape the parade object to, or decide would not enhance their parade and their own message, theme, or entertainment value. In a private parade only the sponsors have the right to make this decision.

Judge Flannery's decision states: "The Parade . . . is composed of diverse groups espousing myriad themes and values" (B24). While it, like all parades, may be composed of diverse groups, the Parade itself does not celebrate myriad themes and values. It celebrates what its sponsors say it does, St. Patrick's Day and Evacuation Day, a fact which everyone in the City of Boston seems to be aware of, except apparently Judge Flannery and the Supreme Judicial Court.

The fact that marching units may incidentally communicate a message of their own at the forebearance of the sponsors does not mean that the sponsors of the parade have no

message to communicate themselves, or that they can not exclude messages contrary to their own overarching theme or message, or which, in their view, detract from or are not appropriate to their theme.

Further, there is nothing in the Constitution that says that, if an expressive activity or speech encompasses many themes, it is not sufficiently focused to qualify for First Amendment protection. Messages are speech. And if a parade has one message, or ten messages, or a hundred messages, it still constitutes speech, whether focused or not. A surfeit of messages or speech does not change its nature to non-speech. But, as a matter of fact, this Parade had just two themes or messages, both of which are indicated by the Parade's very name. Any other messages that individual units may have expressed in the Parade either reflected those traditional religious and social values that the Veterans testified they were celebrating, or were part of the entertainment, a common purpose of most parades, or else were allowed by the Veterans at their forebearance as being merely incidental expressions not contrary to their own themes and messages. These kinds of incidental messages take place in nearly all privately sponsored parades.

Further, contrary to Judge Flannery's assertion, this Parade did not espouse "myriad" values. As Judge Flannery's decision itself noted, the Veterans asserted that their Parade "expresses traditional religious and social values" (B3). Nowhere does Judge Flannery point to any theme in the Parade which is *contrary* to traditional religious and social values. The Veterans testified that, in celebrating St. Patrick's Day and Evacuation Day, they were expressing and celebrating "their traditional religious and social values," which in their view these themes represented. The Massachusetts courts point to nothing in the record to contradict this except that participants, as in nearly all parades, come from various elements of the community, and may incidentally project a message of their own.

The Supreme Judicial Court upheld Judge Flannery's absurd conclusion that this Parade was not focused "on a specific message, theme, or group – perhaps a Temple or

Parish congregation" (B24), and so "it is impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment" (B25). They obviously felt that St. Patrick was not a theme of the St. Patrick's Day Parade.

The Supreme Judicial Court noted that the defendants pointed to evidence in the record that the Parade did have a message, but summarily dismissed this by stating that all the evidence was before the trial judge "when he made his decision, and we assume that he considered all the evidence" (C14). The Court said that "on our own review of the record, we could not conclude that the findings of the judge were clearly erroneous" (C4). This statement defies both reason and legal precedent. The finding of the Massachusetts courts was that the Parade contained "myriad themes and values" (B24). From this, the Massachusetts courts concluded that it contained no themes or values. It also concluded that the Parade, which had no theme or message, actually did have messages, but they were not sufficiently focused to constitute speech. If this rationale is upheld, the protection now afforded free speech by the First Amendment would no longer be certain. To qualify for First Amendment protection, speech or expressive activity would have to be sufficiently isolated from other speech, and would have to be sufficiently focused in the view of the governmental judge of this matter. To subject speech to such a subjective standard, as to whether it is sufficiently focused so as to constitute speech, would be to subject all speech to the subjective vagaries, whims and prejudices of governmental officials, whose thinking may not be sufficiently focused on the First Amendment to make such a subjective and amorphous determination. It, in effect, removes the iron-bound protection which speech has heretofore been given by the First Amendment.

As previously noted, the very name of this Parade expressed its theme and message. As such, it is self-evident, even without the uncontradicted testimony of the Veterans as to what it represents. It, of course, is a celebration of a religious/cultural feast day, together with a patriotic holiday,

and the penumbra of traditional values that these days represent to the Veterans who sponsor this celebratory parade.

To the Massachusetts courts, however, contrary to common knowledge, common sense, and the uncontradicted testimony of the Veterans, this Parade was basically meaningless – that it was just an exercise in sound and fury signifying nothing – it had no "expressive purpose" (C15).

The decision of the Supreme Judicial Court stated that: "The dissent suggests that the finding of the judge that the parade did not have an expressive purpose was clearly erroneous because the parade provides entertainment to the spectators. Aside from the fact that the defendants themselves did not assert this as evidence of an expressive purpose, we are puzzled by the dissent's assertion, without citation, that the mere provision of entertainment would transfer the parade into an expressive event" (C14, footnote 10).

This is not a complete nor totally accurate account of what the dissent said. The dissent said: "The Veterans Council obtains a license, collects funds, and privately organizes the St. Patrick's Day – Evacuation Day Parade each year. They do so knowing that their efforts will provide entertainment to the hundreds of thousands of spectators who line the streets of the South Boston section of Boston to watch *in celebration* of St. Patrick's Day and Evacuation Day" (C21), (emphasis added). The majority's restatement of the dissent conveniently ignores that part of the statement that notes that the entertainment is "in celebration of St. Patrick's Day and Evacuation Day." And, of course, a celebration of something that has obvious symbolic meaning is an expressive activity and speech. The majority's restatement, however, creates the illusion that the Parade is not a celebration of anything, but merely entertainment for entertainment's sake, and is not meant to celebrate meaningful events dear to the hearts of both the sponsors and spectators. The Parade, with its bands and entertainment, is the method that the sponsors use to celebrate and express their sentiments, values, loyalties, and pride. And, as the Court said in *New York County Board of Ancient Order of Hibernians v. Dinkins:* "The manner and means by which the

message is conveyed is also a matter of constitutionally protected free speech," 814 F. Supp. at 367 (A21 – incomplete cite). Parades, bands and entertainment in celebration of an event, then, are also protected speech.

In fact, even entertainment for entertainment's sake is also protected speech, contrary to the majority's suggestion. Even "string bands," "fancy clubs," "comic clubs," and other forms of entertainment in parades have been held to be protected speech. (*Tacynec v. City of Philadelphia*, 687 F.2d 797 (1982). As the Court said in *Tacynec, id.*, at 796:

> "The City of Philadelphia argues that because the plaintiffs' activity does not convey an overtly political or ideological message, it is not "speech" and therefore is not entitled to First Amendment protection. However, the Supreme Court has made it clear that '[e]ntertainment, as well as political and ideological speech, is protected; –' "

This included "non-obscene nude dancing", "human cannon-ball performance", "adult films", the musical production 'Hair', and "folk music" (See *Tacynec*, supra, at 796). The Court went on to say:

> "Because the Mummers-type string band performance is a form of expressive entertainment, we hold that it is covered by the First Amendment."

Sponsors of a private parade may celebrate and express their theme as they wish, and even with groups that the Court deems to be irrelevant to the Parade's theme, including entertainment groups such as "Joey Clowns" and the "Cycling Murrays" (B7). And they should not be forced to explain and justify their decisions as to the composition of the Parade, and how it expresses or celebrates their themes, values, and expressive association. Just as the City cannot go into "content," neither can the Court.

Further, this "entertainment" issue was raised at trial. In fact, the trial court itself made it an issue by questioning the relevancy of entertainment groups to any message or speech

(B6, B7). But, contrary to the majority's statement, it was also asserted by petitioners in their original memorandum of law to the trial court and in their appellate brief (p. 19), both of which cited the above-cited *Tacynec* case. It was also cited in the amicus brief submitted to the Supreme Judicial Court by the Catholic League for Religious and Civil Rights, also in support of the position that entertainment is protected speech. Moreover, raised or not, it is case law, and so is applicable.

In this day and age of protests, there is a tendency to assume, perhaps subliminally, that protected speech must be controversial, political, or in protest of something. This, of course, is not the case. Speech or expressive activity celebrating something receives the same First Amendment protection as speech opposing something.

And a Parade honoring St. Patrick and traditional values is just as much protected speech as a public protest against what the organizers oppose or consider to be morally and socially wrong.

The gardener who celebrates his love of flowers is making as much of a statement as the gardener who proclaims his hatred of weeds.

The decision of the Massachusetts Courts, then, that this Parade was not an expressive activity and protected speech is divorced from the reality of the real world, as well as from legal precedent. The First Amendment should not be vulnerable to such unreal and convoluted rationalizations.

## POINT II

## THIS PARADE WAS NOT OPEN TO THE PUBLIC, AND SO WAS NOT A PUBLIC ACCOMMODATION.

After finding that this Parade had no expressive purpose, Judge Flannery went on to rule that the Veterans did not determine who would march in the Parade. His decision states:

> "Given the lack of selectivity exerted by the Veterans over the Parade participants and sponsors,

> as well as the Parade's historical roots, I conclude that the Parade is a public event." (B9).

As a further argument that the Parade sponsors did not exercise selectivity, Judge Flannery says:

> "Indeed, since 1947 the only groups that have been excluded from the Parade besides GLIB have been the Ku Klux Klan and ROAR (Restore our Alienated Rights). Neither of these groups, however, is protected under M.G.L. c. 272 ___92A and 98." (B7).

Again, Judge Flannery muddies the water. The question at issue is whether the Veterans exercised control over who could march and who could not. It is irrelevant to the control and selectivity issue as to whether these groups were protected under the state statute or not.

Moreover, Judge Flannery also misstates the facts and the trial testimony. The majority decision itself noted that the Veterans also excluded the Massachusetts Right to Life group, and a truck carrying anti-homosexual signs. It further noted that NORAID was prevented from marching until it altered its message (C8, footnote 10).

If since 1947 only four groups besides GLIB were excluded from the Parade, and another forced to alter its message before it was admitted, there is an obvious reason. None of the other participating groups had themes which the Veterans considered antithetical to the theme of their Parade, or which injected unwanted controversial issues into it.

How did the Supreme Judicial Court of Massachusetts deal with the obvious fact that the Veterans had exercised control over their parade, and selectivity as to participants and messages. It just arbitrarily dismissed its import. It said: "Assuming this to be true, we perceive no legal relevance of this fact to the findings of the judge or the conclusion we reach" (C8, footnote 10). The fact that the Veterans did not allow certain segments of the public into their parade, screened out controversial or unwanted messages, and barred groups that it found were inappropriate to the theme of their Parade – to the Massachusetts Courts, all of this was not relevant as to whether the Veterans exercised control and

selectivity over their Parade. The Massachusetts Courts here have, in effect, said: "Don't confuse us with the facts."

The trial testimony of John Hurley was that 90% to 95% of the participants in the Parade marched before (Trial testimony of John J. Hurley, Trial Transcript page A-380, cited in Petition for Writ, page 9, footnote 1). This alone indicates that the Parade was not open to the public. Certainly, if it was, it would not be primarily composed of the same groups year after year.

Further, the trial court simply ignored the long-standing procedures for admitting applicants to the parade, including even previous participants. As the trial court's decision noted, "Applications for participation in next year's Parade are sent to all previous participants. Those who call to inquire about participation in the Parade are sent applications . . . " (B7, B8). Further, the trial court ignored the fact that questions about newly-formed groups were concerns of the Veterans (Tr. A-250, 7-24), and, as previously noted, some were rejected because they were controversial, objectionable to the Veterans, or deemed not appropriate to the theme of the Parade, and the message that the Veterans Council wished it to project.

Further, as pointed out in petitioners' brief to the Supreme Judicial Court, the Veterans have a written Parade Registration Form. The form is reviewed by the Council. The Veterans have a history of inviting groups through written acceptance. (Trial Transcript is referred to herein as Tr). (Tr. A-245 (8-22), A-292 (5-23), A-323 (8-11), A-379 (11-24), A-380 (1-13)).

The trial court's attempt to turn a private parade into a public accommodation had to resort to misstatements of fact, a wealth of irrelevancies and unreal and ludicrous arguments. It stated that, "The Veterans do not generally inquire into the specific messages or views of each applicant." [B8] As pointed out, 90% to 95% of participants had previously marched, and so were familiar to the Veterans Council. However, the Veterans said that questions about new groups were a concern of the Veterans (Tr. A-250, 7-24). Few, if any, parade sponsors, however, have the wherewithal or time to

have a detective agency develop a security profile on each participant or unit in their parade. As in all parades, the non-acceptability of a group is usually determined by its proclaimed message, or the message their name may communicate, or public knowledge of what they represent.

The trial court also said:

> "In addition, some groups participate in the Parade without submitting an application to the Veterans Council. For instance, in 1993, the Boston Bruins did not apply to the Veterans Council, but simply showed up at the Parade and marched. Other groups gained entrance by making a contribution to the Parade rather than filling out an application form. Thus, the procedures for admittance into the Parade are not uniformly applied." (B8).

As to the few groups who may show up without a registration form and are allowed to march, Mr. Hurley testified that on the day of the parade he makes on-the-spot calls for the Council (Tr. A-375 (3-24), A-376 (1-14), A-417 (2-24), A-418 (1-24), A-419 (1-14)). When a citizen showed up in a truck with anti-gay posters, Mr. Hurley turned the truck away (Tr. A-376 (15-24), A-377 (1-11)). Superintendent Maloney of the Boston Police Department confirmed this (Tr. A-234 (6-24), A-235 (1-7)). As to a few members of the Boston Bruins showing up and marching in the 1992 parade, Hurley testified that he allowed them in as a favor to the Mayor (Tr. A-366 (4-21)).

Judge Flannery also pointed to the fact that "some AFL-CIO marchers carried signs which read 'Boycott Miller Beer' " (B24), conflicting with the various bars and pubs which sell such products. First of all, signs or messages in a parade do not have to be internally consistent. It is the sponsors who have the right to decide whether they are appropriate to *their* own theme, and not whether all individual units agree with each others' message which they may communicate. The Masons and the Knights of Columbus may march in a privately-sponsored patriotic parade without the sponsors losing their First Amendment protection. However, Judge Flannery's decision ignored the facts on even this point. As to the

"Boycott Miller Beer" sign, Mr. Hurley testified he didn't even know they had a sign of that nature and, if he did know, he would have ordered it removed (Tr. A-344 (15-24), A-245 (1-4)).

The record is clear then that this Parade is not an "open recreational event." Participants must apply and be approved by the Council, usually weeks in advance. Only those who are listed on a printed roster may participate (p. 10 of petition), with the occasional exception of a last-minute applicant, who still must receive permission from an authorized representative of the Veterans Council. And, as the record shows, the Boston Police Department would evict any person or group who tried to march without the Veterans' approval (p. 9 of petition, footnote 2).

It is clear here that the findings of fact as to control and selectivity were contrary to the uncontroverted evidence, and should be reversed.

And in a parade of over 10,000 marchers, the trial court could not point to a single instance where a person or group ever marched without the Veteran's permission.

As the Veteran's brief before the Supreme Judicial Court brought out:

> "What the trial court did here was to take the few *authorized* exceptions to the admission's rule, and treat them as the usual way participating groups were admitted. The trial court simply ignored the procedure of being invited, being accepted, and the firm control the Veterans exercise over the messages and offensive themes." (Emphasis added.)

The trial court tried to portray a picture where any member of the public could show up at the Parade and march. This scenario is completely at variance with reality.

As noted, Judge Flannery's decision is not able to point to one First Amendment case in support of his ruling involving a parade or other private expressive event. He is reduced to suggesting that the St. Patrick's Day/Evacuation Day Parade is not really a parade at all. He says: "In the instant case, the Parade is more akin to a 'social association' " (B24)

(*Dallas v. Stranglin,* 490 U.S. 19 [1989]), which involved a dance hall.

The attempt by Judge Flannery to liken a parade to a dance hall only illustrates the complete absence of any cases in this area in support of his decision. Further, the *Dallas* case held that people *could be excluded.*

Judge Flannery also based his decision on the fact that the Parade celebrates a public holiday. (B8 and C13, footnote 17). This, too, is irrelevant. A private group may celebrate anything it wants, including what has been declared to be a public holiday, without losing its private status and First Amendment protection, and without becoming a public accommodation open to the public at large. As the Court ruled in *Gay Veterans Ass'n Inc. v. American Legion,* 621 F. Supp. 1510 (at 517):

> "Plaintiff's argue that the American Legion parade is a public forum because its purpose is to celebrate a public holiday, Veterans Day, in a public street. This, however, does not turn a private parade into a public forum. Under New York law, the sponsorship of parades to celebrate Veterans Day is not an exclusively public function."

The decision of the trial court (B24, 25) and the Supreme Judicial Court (C13) both try to distinguish this case from the *AOH v. Dinkins* case (supra) by arguing that the Boston Parade had a variety of participants who communicated diverse messages and, further, it celebrated a public holiday. The Supreme Judicial Court said, "We also note that the New York parade celebrates only St. Patrick's Day, while the Boston parade celebrates, in addition, Evacuation Day. . . . It was partly on this basis that the judge characterized the Boston parade as a 'public event.' " (C13, footnote 17). As noted, this is error (see *Gay Veterans*, supra). As the decision was based on the weight of a combination of facts, this alone is reversible error.

Judge Flannery also based his decision on the longstanding history of the Parade (B8) (C13, footnote 18), its large size (B9), its airing on television (B9), and diversity of participants (B9).

These were all issues raised in *AOH v. Dinkins,* supra. As was pointed out in Judge Duffy's decision in the AOH case, supra, "The St. Patrick's Day Parade has been a fixture of the New York City scene for well over two hundred years. The first New York St. Patrick's Day Parade took place in 1762" (A6). Further, as Judge Duffy noted that:

> " . . . it is abundantly clear that some of the marchers participating in the St. Patrick's Day Parade are neither members of the AOH nor members of the Roman Catholic Church. . . . The Parade marchers generally number in the vicinity of 150,000, with between one and two million onlookers. The New York St. Patrick's Day parade is carried by at least one local television station and quite often parts of it are shown on national television.
>
> The St. Patrick's Day Parade is billed as the largest annual civilian Parade in the world. The Parade celebrates, *inter alia,* freedom and Irish culture and heritage. Traditionally, elected officials have marched in the Parade regardless of their religious or political affiliation or of their position on any issue. Joint Statement of Uncontested Facts ("Jt. Stmt.") at para. 13" (A7).

As for size, the New York Parade has been seven to fifteen times larger than the Boston Parade, has longer historical roots, is televised, often, in part, on national television, is a *civilian* parade celebrating more than one theme (the Parade celebrates, *inter alia,* freedom and Irish culture and heritage), is composed of diverse groups, bands, colleges, professional groups (nurses, firemen, etc.), and elected officials "regardless of their religious or political affiliation or of their position on any issue."

It is clear that, in trying to find a peg to hang its decision on, the trial court repeatedly misstated the Veterans' arguments, claims, and the factual situations surrounding this event, as well as misinterpreting law and legal precedents. The decision that speech was not involved in this Parade, and that it was open to the general public to participate in, is

clearly not in accord with reality, nor with the testimony and record.

Although it was not an issue in the District Court action, *South Boston Allied War Veterans v. City of Boston,* supra, Judge Wolf noted that the 1995 Parade incorporated "the Veterans' usual themes of honoring St. Patrick and celebrating the traditional Irish family and family values" (p. 1), and noted that these themes "have been the themes of the previously litigated Parades" (p. 21).

The attempt by the trial court to obscure the obvious fact that this Parade had an expressive purpose and theme, and so was protected speech, and that the Veterans exercised control and selectivity over who could march, and to exclude unwanted messages, was more than a classic example of legal obfuscation and obscurantism. It was Kafkaesque.

## POINT III

## ONE CANNOT BE FORCED TO SHOWCASE ANOTHER'S VIEWPOINTS OR IDEAS.

It is an uncontroverted matter of record that GLIB's participation in this Parade not only would communicate a message, but that this was the purpose of GLIB for marching (B3).

Despite this fact, the Massachusetts Courts ruled that speech was not an issue here. They refused to recognize that the issue of free speech is involved, whether speech is prescribed or proscribed.

The trial court handled this objection by simply not addressing it. The Supreme Judicial Court did take note of it, but dismissed its First Amendment implications based on two erroneous assumptions (C14, footnote 19). It said the private automobile of a New Hampshire resident could not be characterized as a public accommodation. This distinction presupposes that a public accommodation law can override the First Amendment and impose unwanted speech on an unwilling party, whereas a motor vehicle law cannot.

Its decision also indicated that the First Amendment protection against compelled speech only applied here if the

Veterans could "demonstrate that they were exercising their First Amendment rights . . . " (C14, footnote 19). This is erroneous.

The U.S. Supreme Court has consistently ruled that one cannot be forced to foster, endorse, proselytize or subsidize a view with which he or she disagrees, under long-established First Amendment doctrine. The Supreme court unmistakenly ruled out such coercion in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628. The court said: "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from *all* official control." Id. at 642, 63 S. Ct. at 1187 (emphasis added). It further said that the state has no "power to force an American citizen to publicly profess any statement of belief."

Perhaps the landmark case on this issue is *Wooley v. Maynard,* 430 U.S. 705, 714, 97 S. Ct. 1428, 1435, 51 L.Ed. 2d 752, which involved the aforementioned New Hampshire motorist. In that case a member of Jehovah's Witnesses objected to being compelled to exhibit on his vehicle license plates the State motto of New Hampshire, "Live Free or Die." The Court ruled that he did not have to do so, and that government may no more prescribe messages than proscribe them. The Court said:

> "We begin with the proposition that the right of freedom of thought by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *Board of Education v. Barnette* 319 U.S. 624, 633-634 (1943); *id,* at 645 (Murphy J., concurring). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." *Id,* at 637. This is illustrated by the recent

> case of *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), where we held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized. We concluded that such a requirement deprived a newspaper of the fundamental right to decide what to print or omit:" (at 714) (see also *Wallace v. Jaffree,* 472 U.S. 51).

It is undeniable that to compel another to foster, or aid and abet, or proselytize, or to provide a platform, or to associate with a view that is in conflict with one's own religious, social, or moral views invades "the sphere of intellect and spirit which it is the purpose of the First Amendment to our constitution to reserve from *all* official control," as stated in *West Virginia v. Barnette,* supra. (Emphasis added.)

As was said in *International Ass'n. of Machinists v. Street,* 367 U.S. 740 815 Ct. 1, 784, 6 L.Ed.2d 1141, (quoting Thomas Jefferson), "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." In the instant action, the Veterans are not only being forced to spend time and money to provide a platform to showcase a theme which they strongly oppose, but also to publicly associate themselves and their own values and messages with it. In the aforecited words of Thomas Jefferson this is "sinful and tyrannical," not to mention a violation of the First Amendment rights of the sponsors.

## POINT IV

## THE ISSUANCE OF A PARADE PERMIT BY OPERATION OF LAW RESERVES A PUBLIC FORUM TO THE EXCLUSIVE USE OF THE PRIVATE PERMIT HOLDER

As far as we are aware there are no cases that grant a party the right to demonstrate or march in an area granted by permit to another party's separate event. As was stated in *Sanders v. United States,* 518 F. Supp. 728, 730 (D.D.C., 1981), *aff'd without opinion,* 679 F. 2d 262 (D.C. Cir. 1992). (Emphasis added)

> "The court finds that the confusion and disorder that could be caused by all single, peaceful intrusions is significant enough to support defendants' policy of excluding such intrusions. Secondly, and more fundamentally, is the interest in guaranteeing citizens the right to participate in events or demonstrations of their own choosing without being subject to interference by other citizens. *A physical intrusion into another event for the purpose of interjecting one's own convictions or beliefs is by definition an interference, regardless of how insubstantial or insignificant it might appear.* As such, it is an interference with the rights of other citizens to enjoy the event or demonstration in which they have chosen to participate, *and in an area reserved for them.*"

The court in *Sanders* upheld the arrest of a single intruder who sought to peacefully intrude upon another's event for which a permit had been obtained.

Even when a true public accommodation such as a restaurant, or a room therein, is reserved for a private party it is no longer a public accommodation during that time, and the public would not be entitled to enter during the time it is so reserved. The same is even more true of a public forum reserved by permit for a private group.

Another case upholding the *Sanders* reasoning is *Bishop v. Reagan-Bush '84 Committee,* 635 F. Supp. 1020, 1023, 1024 (S.D. Ohio 1986), which held that opposition signs could be removed from a permitted event.

## POINT V

## THERE WAS NO EXCLUSION OF ANYONE FROM THE PARADE BASED ON THEIR SEXUAL ORIENTATION. THEREFORE, THE MASSACHUSETTS PUBLIC ACCOMMODATION STATUTE IS NOT APPLICABLE HERE.

By their own testimony, GLIB wanted to march in order to make a statement about homosexuality and to show their

support for the homosexual group that was seeking to participate in the New York St. Patrick's Day Parade.

In this case there has been no testimony that members of GLIB were barred from this Parade because of their sexual orientation.

It is their propaganda that was objected to by a private group unwilling to showcase another's unwanted message. No one ever prevented anyone from marching in the 47 year history of this Parade because of their sexual orientation. Note that GLIB's self-proclaimed purposes for marching had nothing to do with honoring St. Patrick, nor celebrating Evacuation Day, which are the themes of the Parade.

As the dissent in the decision by the Supreme Judicial Court noted, "if the Veterans Council excluded GLIB because of its message. . . . then the statute was not violated" (C24). The dissenting opinion stated that the trial court's decision and order resulted in 'mandating speech [the Veterans Council] would not otherwise make', and is thus content based regulation. *Riley,* supra" (C20).

What Judge Flannery did was to confuse messages and propaganda with sexual orientation. He states:

> "In 1993, the Veterans again denied GLIB permission to participate in the Parade, asserting the decision to exclude groups with sexual themes merely formalized that the Parade expresses traditional religious and social values. Exh.43." (B3).

He then states:

> "The Defendant's final position was that GLIB would be excluded because of its values and its message, i.e., its members' sexual orientation. Tr. of Closing Arg. pp. 43, 51-52 (Nov. 23, 1993)". (p.4., footnote 5); (B4, footnote 5).

Here Judge Flannery equates the "values" and "messages" of the would-be marchers with their "sexual orientation". No one has inquired into the sexual orientation of any marchers. This rationale of the trial court was noted by the Supreme Judicial Court without comment, or criticism (C5 & 6, and footnote 8 on C6). Contrary to what the Massachusetts

courts hold, excluding GLIB "because of its values and its message" is not the same as excluding it because of the sexual orientation of their members. There may be, and probably are, many homosexually oriented people who would disagree with the message GLIB wished to communicate by marching, just as there are probably many heterosexuals who would support GLIB's message. Messages and ideas are not the same thing as "sexual orientation" and cannot be equated. To say that they are is a judicial version of the Alice-in-Wonderland statement: "When I use a word it means just what I choose it to mean . . . neither more nor less."

## POINT VI

## THE LOWER COURT'S DECISION WAS AN ATTEMPT TO IMPOSE CONTENT-BASED ADDITIONS AND ALTERATIONS TO THIS PARADE AND ITS MESSAGE, AND AS SUCH IS ABSOLUTELY FORBIDDEN BY THE FIRST AMENDMENT.

That Judge Flannery's decision is addressed to and based on expressive content rather than the sexual orientation of the marchers is made very clear, not only by his failure to cite anyone excluded from the Parade because of their sexual orientation, but also because he flatly asserts that content is what is involved here. He says:

> "Several cases, although they are distinguishable on other grounds, illuminate the invalidity of the Veterans' purported reasons for excluding GLIB. Excluding all sexual themes not only contravenes the First Amendment's prohibition on content-based restrictions, see *Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 537-38 (1980) (prohibiting discussion of an entire topic violates the First Amendment), but is a form of discrimination itself. – Consequently, the Veterans' exclusion of GLIB under the guise of excluding all groups with sexual themes violates the public accommodations law's prohibition on sexual orientation discrimination." (B4, footnote 6).

Thus he turns the First Amendment completely on its head to make it compel what it actually forbids. The cases that he cites here are completely inapposite.

The situation in the *Con Edison* case is comparable to the present action. Con Edison was asked by a private group to open its billing envelopes to contrasting views (p. 532). It refused. The Commission then ruled that utilities could not use "bill inserts to discuss political matters, including the desirability of future development of nuclear power."

In overruling this decision, the U.S. Supreme Court in the *Con Ed* case said:

> "As a consequence we have emphasized that time, place, and manner regulations must be applicable to all speech irrespective of content. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 209 (1975); see *Carey v. Brown,* ante, at 470. Governmental action that regulates speech on the basis of its subject matter slip[s] from the neutrality of time, place, and circumstance into a concern about content.

His decision, then, is based on the egregiously erroneous views that a person's "sexual orientation" and his or her views are one and the same thing; that private groups cannot exclude sexual themes from their speech; and that a ruling against government interference with the free speech and expression of private groups, actually supports giving government the right to interfere with such speech; and further that these restrictions on governmental interference are really applicable to private citizens, the very parties to whom these restrictions are meant to protect.

In trying to explain away the Veteran's speech (which is the Parade itself and what it symbolizes) Judge Flannery has arbitrarily decided that it is he who has the right to determine what the composition of the Parade should be; how narrowly or broadly the Parade's theme must be expressed or focused (B24); how similar the participants' viewpoints must be (B24); how monolithic a Parade must be, including how diverse the participants can be (B6, 7 and 24); how circumscribed the alleged messages of the marchers must be (B24, 25); that the sponsors of a Parade cannot exclude sexual

themes (B4, footnote 6); that "values" and "message" relating to sexual orientation cannot be excluded (B4 footnote 5, & 31), and other areas relating to the content of the theme, messages, and values expressed by the Parade.

He even assumes to speak for the Veteran's,, saying: "A proper celebration of St. Patricks and Evacuation Day requires diversity and inclusiveness. . . . " (B24). Judge Flannery ends his rationale with a bizarre flourish. He says:

> "History does not record that St. Patrick limited his ministry to heterosexuals or that General Washington's soldiers were all straight. Inclusiveness should be the hallmark of their Parade." (B28).

However, it is the Veterans and not Judge Flannery who should have the right, under our Constitution, to determine what "the hallmarks of their Parade" should be.

As Judge Duffy said in the *New York AOH* case, supra:

> "Such activity (telling citizens what they must think and how they must express themselves) is something one would expect from the Thought Police described by George Orwell." (A24)

## POINT VII

## THE DECISION OF THE MASSACHUSETTS COURTS ALSO VIOLATED THE APPELLANTS' RIGHTS OF FREEDOM OF EXPRESSIVE ASSOCIATION.

Again we emphasize that this Parade is the Veterans production, their assembled performance – their speech. However the Massachusetts public accommodation statute is not applicable here even to expressive associations. It is only applicable where commercial activity is involved (see, *Invisible Empire KKK v. Mayor et al. of Thurmont,* 100 F. Supp. 281 (D.Md. 1988) at 289.

Further, as the decision in *Roberts v. United States Jaycees,* 468 U.S. 609, said, infringements, not on speech, but on the right of association "may be justified by regulations adopted to serve compelling state interests [that are] *unrelated to the suppression of ideas* . . . " (468 U.S. at 623). (Emphasis added). That is clearly not the case here.

And as previously noted, this Parade is speech, and not merely an association gathered together for expressive purposes. It is the Veterans expression. As such, its First Amendment protection is not subject to a balancing of interests.

## CONCLUSION AND SUMMARY

This Parade was not a membership organization. The Veteran's Council was the membership organization, and the Parade itself was its speech – its production.

And, it is obvious that this Parade had a theme and expressive purpose, which was stated and communicated by its very name. It was a Parade in honor of St. Patrick, patron Saint of Ireland, and also in celebration of Evacuation Day, and the penumbra of "traditional religious and social values" which the Veterans testified that this day, and the Parade celebrating it, represented to them (B3).

Honoring St. Patrick, and celebrating what he means to the Irish people and their values, religion, and culture, is certainly a message.

The First Amendment is not negated because a parade or production has multiple messages. Speech is speech, and is protected whether it has one message or one hundred messages.

There is no such standard that private speech must be sufficiently focused to enjoy First Amendment protection. This is Judge Flannery's invention, and it would decimate the First Amendment rights of all of us. This criterion is an unprecedented limitation on First Amendment protection of free speech. There is no legal precedent for it, and it would, if not terminate the protection given to speech, at least have such a chilling effect on free speech, that the practical result would be the same.

Further, the Massachusetts courts, having recognized that this Parade contained myriad messages, cannot logically say that it had no message, as it did.

Moreover, the record shows that Veterans did have a policy of selectivity, and a history of excluding unwanted themes and messages from their Parade. However, the

Supreme Judicial Court of Massachusetts just arbitrarily dismissed its import, saying it had "no legal relevance –" (C8, footnote 10).

Further, the trial court decided the Parade was a public accomodation because of its lack of "selectivity", and that it celebrated a public event which was a public holiday (C13, footnote 17, B8, B24). And, as the trial court indicated that its decision was based on the combined effect of these two findings, this alone is reversible error.

Further, aside from the issue of the Veteran's own speech, this case still involved the issue of free speech. The First Amendment absolutely forbids compelling someone to associate with, display, or showcase another's message against its will no matter what state law attempts to compel it. To do so is far more tyrannical and violative of the integrity of a person than banning their speech. It violates their conscience and personal integrity. In the aforecited words of Thomas Jefferson it "is sinful and tyrannical".

Moreover, this Parade is the speech of the Veterans Council. But even if viewed as a membership organization, their application of the law was erroneous. As the *Roberts* case, supra, said, infringements on the right of association may be justified only if they are "unrelated to the suppression of ideas" (468 U.S. at 623). That is not the case here.

It is also constitutional law that the issuance of a parade permit by operation of law reserves a public forum for the exclusive use of the private permit holder. The public highways are a traditional public forum.

But even if a true public accommodation, such as a restaurant, or a dining room therein, is reserved for a private group, outsiders cannot intrude during the time it is reserved. This is even more so of a public forum reserved by permit for the use of a private organization.

Also, the trial court could not point to anyone every being excluded from this parade because of their sexual orientation. As the dissent noted, the trial judge, in order to apply the state statute to this Parade "equates excluding a group on the basis of its message or values with exclusion on

the basis of its members sexual preference –. This is a clear error" (C24).

Finally Judge Flannery's decision was a blatant attempt to impose content – based additions and changes to this Parade. He said that "Excluding all sexual themes – is a form of discrimination itself" (B4, footnote 6). This is a clear error. He assumes to speak for the Veterans, saying, "A proper celebration of St. Patrick's Day and Evacuation Day requires diversity and inclusiveness –" (B24).

He concludes his decision by stating:

> "History does not record that St. Patrick limited his ministry to heterosexuals or that General Washington's soldiers were all straight. Inclusiveness should be the hallmark of their Parade" (B28).

However, if the First Amendment means anything, it is the organizers of this Parade who have the right to determine what "the hallmark of their Parade should be".

To repeat the words of Judge Duffy in the *AOH v. Dinkins* case, supra:

> "Such activity (telling citizens what they must think and how they must express themselves) is something one would expect from the Thought Police described by George Orwell" (A24).

Therefore, The Catholic War Veterans of the United States of America, Incorporated, respectfully submits that the application of the state's anti-discrimination law to this Parade is unconstitutional, and urges this Court to reverse the decision of the Massachusetts courts.

Respectfully submitted,

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No. 94-749

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

JOHN J. HURLEY, Individually, and the
SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,
*Petitioners,*

v.

IRISH-AMERICAN GAY, LESBIAN AND
BISEXUAL GROUP OF BOSTON,
An Unincorporated Association By and Through
TIMOTHY DALEY, BARBARA KAY and
CATHLEEN FINN, Acting on Their Own Behalf and
on Behalf of Members of the Association,
*Respondents.*

**On Writ of Certiorari to the Supreme Judicial Court of Massachusetts**

## BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AND NEW YORK COUNTY BOARD OF THE ANCIENT ORDER OF HIBERNIANS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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No. 94-749

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JOHN J. HURLEY, Individually, and the
SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,
*Petitioners,*

v.

IRISH-AMERICAN GAY, LESBIAN AND
BISEXUAL GROUP OF BOSTON,
An Unincorporated Association By and Through
TIMOTHY DALEY, BARBARA KAY and
CATHLEEN FINN, Acting on Their Own Behalf and
on Behalf of Members of the Association,
*Respondents.*

---

**On Writ of Certiorari to the
Supreme Judicial Court of Massachusetts**

---

## BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AND NEW YORK COUNTY BOARD OF THE ANCIENT ORDER OF HIBERNIANS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

---

This amicus curiae brief is submitted in support of petitioners John J. Hurley and the South Boston Allied War Veterans Council. By letters filed with the Clerk of the Court, petitioners and respondents have consented to the filing of this brief.

## INTEREST OF AMICI CURIAE

The Center for Individual Rights ("CIR") is a non-profit public interest law firm founded in 1989. Through its litigation activities, CIR has sought to advance respect for individual rights, particularly the rights to freedom of speech and expression guaranteed by the First Amendment. *See, e.g., R. A. V. v. City of St. Paul,* 112 S. Ct. 2538 (1992). CIR believes that in recent years courts and government entities, in pursuing goals of social justice and tolerance, have circumscribed fundamental First Amendment rights. CIR believes that a government that regulates or subsidizes private activities must be held to the strictest standards of content and viewpoint neutrality. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 417 (Mem), *granting cert. to* 18 F.3d 269 (1994).

The New York County Board of the Ancient Order of Hibernians ("AOH") has had direct experience of state restrictions on its rights to free speech and expression. Like petitioners in this case, AOH has been the traditional organizer of a large St. Patrick's Day parade. Also like petitioners, AOH faced a city administration that sought to dictate to it which messages should be included in its parade. The New York City Commission on Human Rights found the AOH parade a "public accommodation" and required AOH, despite its longstanding policy of excluding groups with controversial messages or which espoused teachings contrary to the Roman Catholic Church, to admit to its parade a gay and lesbian advocacy group under its own banner. AOH successfully vindicated its position before a federal court in New York in 1993, *see New York County Board of Ancient Order of Hibernians v. Dinkins*, 814 F.Supp. 358 (S.D.N.Y. 1993), though only after nearly three years of litigation before seven tribunals.

AOH has since been able to hold its annual St. Patrick's Day parade in New York City free of government requirements as to what the appropriate topic and message should be. However, the cost of the city's intrusion was enormous—in money, diverted energies and rancor that diluted the festive nature of the event. Other chapters of the Hibernian organization have reported similar attempts by local governments to force the inclusion not only of gay and lesbian groups, but also of others, like the Ku Klux Klan, with whom the Hibernians disagree. AOH has a keen interest in the standards this Court may enunciate in the instant case.

## STATEMENT OF THE CASE

This case arises from the effort of a group of private organizations and individuals to march on public streets, in a tradition dating to colonial times, to express a collective message. Until the decisions now under review, the City of Boston ("City") had granted the South Boston Allied War Veterans Council ("Veterans") a permit every year since 1947 to conduct their annual St. Patrick's Day/Evacuation Day Parade ("Parade") on the streets of South Boston. In a ruling stemming from the 1993 Parade, a Massachusetts superior court ruled, in effect, that the Veterans could not conduct their Parade unless they allowed respondent Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") to march in the Parade under GLIB banners. There is no dispute that GLIB's organizational purpose, and the reason it sought to march in the Parade, was generally to affirm the homosexual lifestyle of its members and to demonstrate the diversity of the Irish-American and the gay and lesbian communities.

The superior court did not rely on the presence of City involvement in the Parade; indeed it specifically found that the City's tangential involvement "did not amount to state action." *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, Superior Court

Action 92-1516 (Dec. 15, 1993), Petition for Certiorari ("Pet. App.") at B16-B24. The court's decision rested on the Veterans' refusal to alter their activities to conform to a message of "inclusiveness." In the words of the state superior court, inclusiveness "*should be* the hallmark of their parade." Pet. App. at B28 (emphasis added). The superior court's grant of a permanent injunction preventing the Veterans from excluding GLIB from their Parade was affirmed by the Massachusetts Supreme Judicial Court. *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, 418 Mass. 238, 636 N.E.2d 1293 (1994). This Court granted certiorari on January 6, 1995.[1]

## SUMMARY OF ARGUMENT

I. The state court injunction plainly violates the Veterans' rights to free expressive association. A public parade is a clear exercise of protected rights of association for the purpose of communicating collective messages and values. As the Court in *Dinkins* noted, a parade organized by a private sponsor is the "quintessential exercise of the First Amendment right of the freedom of expression." 814 F. Supp. at 366.

No rights are more basic to American democracy than the freedom to associate and to speak. As Alexis De Tocqueville said 150 years ago, "the liberty of association has become a necessary guarantee againt the tyranny of the majority." This guarantee protects the rich diversity of American society—where groups as varied as GLIB, the Veterans, abortion rights activists, Greenpeace and Young Republicans have long flourished. The Common-

[1] On January 17, 1995, the United States District Court for the District of Massachusetts issued a memorandum and order that allows the Veterans to conduct a parade in March 1995, of a very different tenor than past Parades, without including GLIB. *See South Boston Allied War Veterans Council v. City of Boston*, CA 94-11402-MLW, 1995 WL 40641 (D. Mass. Jan. 17, 1995). For reasons discussed briefly *infra*, n.20, amici do not believe the District Court's decision moots the controversy at issue in this case.

wealth's insistence on a state-sanctioned display of "inclusiveness" and "diverity" is fundamentally inconsistent with this heritage of voluntary association. The First Amendment does not permit the Commonwealth to forbid private groups from associating unless they do so in a way that affirms official viewpoints.

II. A. The injunction also directly violates petitioners' right to free expression. The superior court's ruling is an express effort to compel private organizations and individuals to communicate a particular state-sanctioned message of "inclusiveness" and "diversity." That effort violates the most basic precepts of the First Amendment. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion. . . ." *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

B. As authoritatively interpreted by the Commonwealth's courts, Massachusetts General Laws Ann., ch. 272, §§ 92A, 98 (West 1990) (the "Public Accommodation Law") clearly discriminates between speakers based upon the content and viewpoint of their messages. If the Parade takes on the state-sanctioned message of inclusiveness and diversity, it will be permitted; if it conveys other messages (i.e. exclusivity, as the state defines it) or simply does not wish to address a controversial subject, the Parade will not be permitted. The Commonwealth's message may be an enlightened one consistent with our heritage of tolerance, but the First Amendment does not allow the Commonwealth to compel its citizens to affirm that message. Above all else, the First Amendment grants American citizens the freedom to choose what they will, and will not, say.

There is no merit to the suggestion that the Commonwealth was merely enforcing a content—and viewpoint—neutral Public Accommodation Law. The superior court made this clear: "a *proper* celebration of St. Patrick's and

Evacuation Day *requires* diversity and inclusiveness." Pet. App. at B24 (emphasis added).

Moreover, the asserted content-neutral policy of assuring equal access to public streets and other public facilities does not require forcing one private group to include another private group in its expressive conduct. The City could allow two parades equal access to the public streets —each affirmatively celebrating different strands of contemporary American society. Instead, the courts have insisted upon only *one* parade that must convey an officially-approved message of inclusiveness while necessarily muting and distorting the sponsor's intended message. The state court's injunction plainly was not intended to and did not advance the Commonwealth's asserted anti-discrimination policy; instead, it sought to regulate the content and viewpoint of private expression.

C. Finally, there is no basis for the state courts' suggestion that expressive activity must have one coherent, identifiable theme in order to qualify for constitutional protection. While petitioners allowed a diverse group of "messages" to be included in their Parade, this fact does not alter their right to find *some* messages inconsistent with the Parade's basic theme—a celebration of traditional Irish culture *as they see it*. Constitutional protections are not undercut merely because a variety of views are communicated by the Parade, any more than an anthology of poems, a film festival, or an incoherent political platform loses its First Amendment protection. Nor have the First Amendment's protections ever been dependent, as suggested by the state courts, upon a private group's implementation of public rules of administrative procedure.

III. A. There were numerous alternatives by which the Commonwealth could have advanced its goal of securing equal access for gays and lesbians to public facilities without infringing the Veterans' right to free expression. The injunction is thus not the least restrictive means of achieving this policy. Indeed, it is not even rationally related to the asserted interest in preventing sexual orientation

discrimination, since the Parade does not exclude gay and lesbian individuals. The Parade excludes groups—without regard to the sexual preference of its members—that wish to communicate messages relating to gay and lesbian matters. The injunction's real purpose is not ending discrimination against individuals, but rather, forcing private groups to swear allegiance to its notion of inclusiveness.

B. It is no answer for the state courts to relabel the petitioners and their Parade as "public" accommodations and then to withhold First Amendment protections. Those protections are not forfeited because the petitioners use the public streets—the classic public forum. Nor are the First Amendment's protections lost because the Parade is successful, and thereby attracts numerous participants and onlookers with multiple views and voices. A rule treating the Parade and similar events as "public accommodations" entitled to minimal First Amendment protections would threaten the freedoms enjoyed by a wide range of collective public speech involving multiple participants. If the Veterans' Parade is a public accommodation, then so are rock concerts, Rainbow Coalition marches, film festivals, anti-war protests, neighborhood block parties and political conventions. Each of these groupings, like the Parade, may contain a diversity of voices; they still enjoy the full measure of freedom to communicate collective messages of their own choosing.

## I. THE STATE COURT INJUNCTION VIOLATES THE VETERANS' RIGHTS OF EXPRESSIVE ASSOCIATION

The First Amendment to the United States Constitution safeguards the historic right of Americans to associate with one another. *New York State Club Ass'n v. New York City*, 487 U.S. 1, 13 (1988); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984); *Gilmore v. City of Montgomery*, 417 U.S. 556, 572-75 (1974); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). The First Amendment's protection for associational rights extends in particular to the right of "expressive associa-

tion," where individuals come together for the purpose of communicating their views to the public. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts*, 468 U.S. at 618-22.

The freedom of private persons to associate with one another has existed since the founding of the Republic. Nearly two centuries ago, Alexis De Tocqueville wrote that: "In no country in the world has the principle of association been more successfully used, or applied to a greater multitude of objects than in America. . . . a vast number of [voluntary associations] are formed and maintained by the agency of private individuals." 1 A. De Tocqueville, DEMOCRACY IN AMERICA 191-94 (Vintage Books, 1990). This is because:

> The citizen of the United States is taught from infancy to rely upon his own exertions, in order to resist the evils and the difficulties of life; he looks upon the social authority with an eye of mistrust and anxiety, and he claims its assistance only when he is unable to do without it. . . . The same spirit pervades every act of social life. . . . In the United States associations are established to promote the public safety, commerce, industry, morality, and religion. There is no end which the human will despairs of attaining through the combined power of individuals united into a society. *Id.*

The historic freedom of association is vital to American liberty and democracy. Our rights as individuals to speak and worship freely require a corresponding liberty to associate with others. The Supreme Court has repeatedly recognized that the "ability and the opportunity to combine with others to advance one's views is a powerful practical means" of assuring First Amendment freedoms. *Club Ass'n*, 487 U.S. at 13. Moreover, this freedom of association is vital to "preserving political and cultural diversity" and to "shielding dissident expression from suppression by the majority." *Roberts*, 468 U.S. at 622.

Again in De Tocqueville's words, "an association unites into one channel the efforts of divergent minds and urges them vigorously towards the one end which it clearly points out." 1 A. De Tocqueville, DEMOCRACY IN AMERICA at 192. Moreover, "the power of meeting" enhances the freedoms of association and speech: individuals "have the opportunity of seeing one another; means of execution are combined; and opinions are maintained with a warmth and energy that written language can never attain." *Id.* And for all these reasons, it is as true now as ever that "the liberty of association has become a necessary guarantee against the tyranny of the majority." *Id.* at 194.

The Veterans' Parade clearly enjoys First Amendment protections for expressive association. The Veterans associate with one another because they share a communal view of traditional values—collective values that they come together with others to celebrate in their St. Patrick's Day Parade. Conversely, the Veterans have excluded other groups that express views the Veterans believe will contradict or dilute their intended message, including the Ku Klux Klan, ROAR and an anti-gay rights group. The Veterans' public assembly for the purpose of conveying some views, but not others, is pure expressive association.

The fact that the Parade provides amusement for a diverse group of citizens in no way vitiates the Veterans' right to use their Parade to promote the message they want to convey. The fact that Parade participants may include groups that have no particular relationship to each other is also irrelevant. Nothing in the First Amendment limits the freedom of association to single-issue interest groups, cohesive lobbies, or tightly-knit religious sects.

Comparing the Veterans' Parade with other examples of protected expressive association leaves no doubt that it too enjoys First Amendment protection. *Cf. Roberts*, 468 U.S. at 621-23 (group that was "neither small nor selective," but that engaged in various protected "political,

social, economic, educational, religious, and cultural ends" had clearly implicated right of expressive association).[2] While the Parade's mesage may be subtle, and in some sense less focused and contentious that the message GLIB wishes to convey, it is no less protected. *Roberts,* 468 U.S. at 636 (O'Connor, J., concurring) ("It is easy to identify expressive words or conduct that are strident, contentious, or divisive, but protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service.")[3]

The application of the Public Accommodation Law against the Veterans' privately sponsored Parade is part of a growing tendency of government at all levels to subject private groups and individuals to increasingly pervasive regulation of association and expression. These regulations ignore the bedrock principle that under the First Amendment, it is for American citizens—not state

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[2] Moreover, to the extent *Roberts* makes selectivity a factor in evaluating freedom of association claims, and given that the superior court specifically relied on the Veterans' alleged "lack of selectivity" in finding the Parade a public event covered by the Public Accommodation Law, Pet. App. at B9, the Massachusetts Supreme Judicial Court was surely wrong in branding the Veterans' past decisions to exclude the Ku Klux Klan, ROAR and an anti-homosexual group as of "no legal relevance." 636 N.E.2d at 1296 n.10.

[3] It has, of course, been petitioners' contention that part of the Parade's mesage is to promote traditional values as they see them. Comparison with *Roberts* is illuminating. In *Roberts,* the exclusion at issue was aimed at a class of persons, women, without regard to their viewpoints on any issues, making it unlikely that the exclusion was part of an associational message. In the Veterans' case, the exclusion is aimed not at a class of people, not homosexuals or lesbians as such (who are welcome to march in the Parade as individuals), but rather as a group, GLIB, whose avowed purpose is to convey a message. This suggests inescapably that the Veterans' exclusion is based on the message GLIB would convey. *Cf. Roberts,* 468 U.S. at 609 ("[the Act] imposes no restrictions on the organization's abilities to exclude individuals with ideologies or philosophies different from those of its existing members.")

officials—to decide what they wish to say and with whom they wish to associate in order to say it. That freedom is denied when, as here, government officials require private groups to affirm state-sanctioned views. It is equally denied when, again as here, state regulations deprive private groups of the freedom to associate and engage in expressive activity with those of their choice. In De Tocqueville's words, collective ideas and messages are only possible when "an association unites into one channel the efforts of divergent minds." Without this breathing space for self-definition,[4] and the formulation of collective ideas and messages,[5] the freedoms of speech and association

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[4] *See NAACP v. Button*, 371 U.S. 415, 433 (1963).

[5] Primarily commercial organizations are not in the business of defining their identities, goals and views in this constitutional sense, and there is thus no reason to fear, as the Supreme Judicial Court intimates, 636 N.E.2d at 1298 n.13, that finding for the Veterans would insulate commercial activities such as restaurants from the reach of antidiscrimination laws. As Justice O'Connor has observed in *Roberts*, the commercial/expressive distinction is the relevant one for determining whether regulation should be subject to rational review or heightened scrutiny. 468 U.S. at 635; Ronald Rotunda & John Nowak, TREATISE ON CONSTITUTIONAL LAW § 20.41 (2d ed. 1992). GLIB has not argued and the courts below did not find that the Parade was a commercial event, indeed the superior court found that the Parade was a "social association." Pet. App. at B24. To be sure, the superior court then attempted to analogize status as a social organization to *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), where this Court stated that a group that comes together only for recreational activities and admits all-comers was not entitled to First Amendment protections. The dissimilarity of the instant case from *Dallas*, however, is made clear by the superior court's very next sentence, recognizing that in the Parade groups "espousing myriad themes and values" come together. The superior court thus did not find, as would be necessary under Justice O'Connor's approach, that the Parade was primarily commercial and not significantly dedicated to expressive activities. Indeed, it found the exact opposite, but merely concluded that since the messages were not internally consistent, the Parade was not entitled to First Amendment protection. This ignores the Veterans' central contention that the Parade had a

are nothing more than the liberty to say what is permitted and associate as the state allows. That is a concept that is being abandoned even in those parts of the world where it once held sway—and it is wholly alien to this country.

The First Amendment serves to protect the rich diversity of American society—what De Tocqueville called the "great multitude" of voluntary associations. This protection has for centuries ensured that groups as diverse as the Veterans, anti-war protesters, Republicans, abortion rights activists, Greenpeace, pro-life groups, the NAACP and countless others may come together to communicate their own distinctive messages. Likewise, the First Amendment has ensured that GLIB may conduct parades, festivals, or protests—without state-mandated inclusion of skinheads or anti-gay messages, or outright prohibition.

The Commonwealth's rulings would change all this. While superficially pretending to enhance a diversity of views, the rulings would lead, as was the case with the cancelled 1994 Parade, to the silencing of authentically distinctive views that would otherwise be heard. In place of the vibrant multiplicity of traditional American volunteerism, the Massachusetts courts would substitute, at best, an homogenized effort to be all things to all people. At worst, it would allow the very sorts of compelled official orthodoxy that other countries have only recently, and rightly, abandoned.

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theme of traditional values that, while accommodating numerous sub-messages not inconsistent therewith, could not accommodate, in the Veterans' view, an affirmation of the homosexual lifestyle. That the Veterans have in fact sought to espouse such a theme is shown beyond cavil by the fact that they have expended so much time and energy in attempting to exclude GLIB from marching under its own banners.

## II. THE STATE COURT INJUNCTION VIOLATES THE FIRST AMENDMENT'S PROHIBITION AGAINST VIEWPOINT DISCRIMINATION

### A. The Injunction Abridged the Veterans' Rights to Free Speech

The Veterans' St. Patrick's Day Parade implicates separate First Amendment protections for *expressive activity itself*. A parade is a quintessentially communicative and expressive event; it is by definition a public display and an attempt to communicate with others. *Dinkins*, 814 F. Supp. at 366. Moreover, the Parade takes place on the public streets, themselves the classic public forum.[6] Much like other parades based on shared cultural, ethnic or religious experiences, the Veterans have demonstrated that a principal purpose of the Parade is to affirm their vision of traditional Irish culture,[7] while also welcoming into their ranks those they perceive as their well-wishers of myriad backgrounds. The Veterans require only that participants not voice views inconsistent with the overall theme of the Parade.

It would be difficult to find an example of protected First Amendment expression more clearcut than the Veterans' Parade. The Parade is a deliberate and concerted effort by a group of private individuals to communicate a message—of their own selection and crafting —to themselves, their neighborhood, the City, and the public at large. It matters not whether their message is a message that all Irish-Americans, or all Bostonians, find correct. What is fundamental is that the Parade partici-

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[6] *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939) (public streets have from time immemorial been "held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions."); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).

[7] *See* 636 N.E.2d at 1295 (noting Veterans' assertion that the decision to exclude groups with sexual themes merely formalized that the Parade expresses traditional religious and social values.)

pants are engaged in speech—of the most public character conceivable. People are free to reject that vision and instead attend a parade whose message is more to their taste.[8] That rejection, however, cannot become the basis for censoring the unpopular.

### B. The Application of the Public Accommodation Law Is Viewpoint Discrimination That Is Absolutely Forbidden by the First Amendment

Because the Veterans' Parade is protected First Amendment activity, governmental interference with the Parade is subject to the most rigorous scrutiny. First, the State is flatly and absolutely forbidden from imposing viewpoint-based limitations on the Veterans' Parade. As this Court recently declared in *R. A. V. v. City of St. Paul,* 112 S. Ct. 2538, 2547 (1992), "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[9]

If the state cannot forbid speech voicing disfavored viewpoints in a public forum, it follows that the state cannot force private expressive activity to voice favored viewpoints. Thus, a fundamental precept of the First Amendment is that the State may not compel individuals or groups to express state-sanctioned viewpoints. *E.g., West*

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[8] Indeed, such alternatives have already appeared in the wake of these events. *See Irish American Parade in Cambridge To Accent Unity,* BOSTON GLOBE, January 21, 1995, at 15.

[9] *Members of the City Council of L.A. v. Taxpayers for Vincent,* 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others"); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 46 (1983); *Widmar v. Vincent,* 454 U.S. 263, 276 (1981); *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 96 (1972) (the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views"); *Niemotko v. Maryland,* 340 U.S. 268, 284 (1951) (State cannot exclude Jehovah's Witnesses from public park for religious meetings, when other religious and political meetings have been permitted).

*Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding unconstitutional a state law requiring public school students to recite Pledge of Allegiance); *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977) (holding unconstitutional state law requiring motorists to display license plate with slogan "Live Free or Die"). Nor can individuals be required to express the views of third parties with whom they disagree, *e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-36 (1977) (state may not require employees to make union contributions to be used for political purposes); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 (1974) (holding unconstitutional state law requiring newspapers to print replies by political candidates); *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 10-11 (1986) (plurality opinion) (State could not compel public utility company to include in its billing envelopes messages of a third party with whom the utility disagreed).

The injunction has both the avowed purpose and direct effect of imposing an official, government-approved viewpoint on the Parade, one contradicting and confusing the message the organizers wish to project. By requiring that the Parade adopt a policy of inclusion, and by requiring that the Parade include outspoken advocates of homosexual lifestyles, the state courts have affirmatively dictated the content and viewpoint of the message expressed by the Parade.

There is absolutely no substance to suggestions that including GLIB in the Veterans' Parade would not affect the message of the Parade. That is conclusively demonstrated by the intensity of the protracted efforts of all concerned in this dispute—including the City, the Veterans and GLIB. This dispute arises, with such passion, precisely *because* of the genuine and important differences between the messages communicated by the Veterans and by GLIB.

Even if bias against homosexuals were the message that the Veterans wished to convey—and it *emphati-*

*cally* is not [10]—the Commonwealth could not constitutionally suppress those views. Bias against those with alternative sexual preferences is inconsistent with the most basic values of progressive America. But this Court has recently, and repeatedly, emphasized that "[t]he First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive--will go unquestioned in the marketplace of ideas." "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." [11]

The Commonwealth's effort to require the Veterans to express a particular viewpoint is simply and flatly forbidden by the First Amendment. The superior court found the excluding of groups with sexual themes to be violative of the Public Accommodation Law's prohibition on sexual orientation based discrimination. 636 N.E.2d at 1295.

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[10] It warrants emphasis that the Veterans have no objection to individual homosexuals marching in the Parade, and have no wish to foster an anti-homosexual message. But for the City's effort to control the Parade's content, there would be no mention of sexual preference in the Parade. The state courts and GLIB, however, finding this silence on the subject not satisfactorily "inclusive," have actually dictated inclusion of a subject the Parade's organizers would otherwise have left out. This is content-based speech dictated by the state at its plainest.

[11] *Texas v. Johnson*, 491 U.S. 397, 414, 418 (1989). *See also R.A.V.*, 112 S. Ct. at 2547; *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) ("I have no doubt about the general power of Louisiana to bar all picketing on its streets and highways. . . . But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. . . . This seems to me to be censorship in a most odious form. . . .") (Black J., concurring); *Aman v. Handler*, 653 F.2d 41, 44 (1st Cir. 1981) (First Amendment rights are implicated when university denies privileges to student group because of disagreement with group's philosophy).

At the very least, this is content discrimination, since it give preferred status and protection to particular themes, in this case, sexuality.[12] While such content discrimination —*if viewpoint neutral*—might arguably be justified in limited public fora, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2147 (1993), it is never justified in a classic public forum like the city streets where the Veterans' Parade takes place. And beyond doubt, the stated policy of inclusion is simply not content-neutral; it is a genuine strongly-held conviction about what message the Parade should convey. The superior court stated the official orthodoxy that the Parade was obliged to adopt in no uncertain terms: "a *proper* celebration of St. Patrick's and Evacuation Day *requires* diversity and inclusiveness." Pet. App. at B24 (emphasis added). The First Amendment plainly forbids this. The *Dinkins* court was surely right in declaring that "[s]uch activity (telling citizens what they must think and how they must express themselves) is something one would expect from the 'Thought Police' described by George Orwell." 814 F. Supp. at 369.

In any event, the state courts' application of the Public Accommodation Law plainly goes beyond content discrimination to actual viewpoint discrimination. The superior court rejected the Veterans' claim that they demonstrated their selectivity by excluding ROAR and the Ku Klux Klan from past parades, noting that those groups are not protected by the Public Accommodation Law. Pet. App. at B7, 636 N.E.2d at 1295. The Supreme Judicial Court also found the Veterans' exclusion of a truck carrying anti-homosexual signs to be "of no legal relevance," *id.* at 1296 n.10, presumably for the same reason. As interpreted by the Massachusetts courts, the

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[12] Even if the Commonwealth's actions were content-neutral, they would still violate the First Amendment. The inclusion of GLIB was not the least restrictive means of preventing sexual preference based discrimination. See Part III.A, *infra*.

Public Accommodation Law thus has the effect of protecting only pro-homosexual messages, and not anti-homosexual messages.[13] The state simply cannot compel or sanction speech in a manner favoring one side in a debate. *Cf. R.A.V.*, 112 S. Ct. at 2547-48. And even more clearly, it cannot compel private citizens to affirm a particular state-sanctioned viewpoint.

### C. The Veterans Have Not Forfeited Their First Amendment Rights By Lacking Detailed Rules or a "Coherent" Message

The Massachusetts courts advanced a variety of related arguments designed to deny the Veterans their First Amendment rights. The courts first suggest that the Veterans were not engaged in expressive speech, asserting that their Parade was not selective.[14] They distinguished *Dinkins* on the ground that AOH had "adopted rules to prevent parade participants from using that parade as a forum to express views inconsistent with the views of the

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[13] It is conceivable that the Public Accommodation Law would be more viewpoint neutral in the case of anti-homosexual messages based on a religious theme, as a class protected under the law, i.e., religion, would then be implicated. This would, however, result in the law not only generally favoring one side in a debate but also in its then differentiating on the basis of which kinds of arguments one side may use.

[14] The lower courts' effort to distinguish *Dinkins* on the basis of group selectivity illustrates their confusion between the free speech and free expressive association claims. The court in *Dinkins*, while opining that there "may well be substance" to the AOH claim that its right to free expressive association was violated by New York's actions, 814 F. Supp. at 368, actually ruled only on AOH's free speech claim. The Massachusetts courts' discussion of the Veterans' supposed lack of selectivity in approving Parade participants, while conceivably relevant to the *Roberts* factors at issue in a free expressive association claim, is unrelated to the ground on which *Dinkins* was actually decided. Amici are not aware of any cases holding that a pure free speech claim turns on how selective the speaker was in crafting the message.

Ancient Order of Hibernians or the Roman Catholic Church." 636 N.E.2d at 1299. That is irrelevant.

It is true that AOH as an organization is selective, and more explicitly religious in character than the Veterans. It is also true that the AOH parade has historically had more formal procedures in place to select parade participants than was the case with the Veterans' Parade. But the First Amendment's protections are not limited to groups that have adopted state-sanctioned administrative procedures; such a premise is utterly inconsistent with the historical origins of expressive organizations in America, which were hardly models of bureaucratic rectitude. And it is utterly inconsistent with the notion that the First Amendment serves to protect *private* association and expression. In an age where governments are aggressively pruning cumbersome administrative bureaucracies, it surely cannot be that First Amendment freedoms depend on private groups' implementation of analogous structures.[15]

The Massachusetts courts' parsimonious reading of *Dinkins* jeopardizes the independence of countless parade organizations that may not have as many formal procedures in place as AOH does for selecting parade participants. While there are some factual distinctions be-

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[15] The superior court put great emphasis on the fact that some Parade participants in past years, such as members of the Boston Bruins hockey team, had even been admitted at the last minute without passing the formal selection process. Pet. App. at B8. Accepting that fact, it does not argue for lesser First Amendment protection. Nothing in the First Amendment demands that private persons, engaged in expressive activity, act like state bureaucracies. What matters, and what the Massachusetts courts do not deny, is that the Veterans did not wish to include the message that GLIB sought to communicate. Apparently the Bruins members did not insist on communicating a message which the Veterans believed inconsistent with the theme of the Parade. Beyond this, it would not matter if the Veterans had previously communicated different messages (for the right to free speech includes the right to change one's speech), or that they had or did not have formal rules regarding participation.

tween the Veterans' Parade and the AOH parade, a rule that the First Amendment protects only highly organized, monothematic parades would endanger all parades—and indeed much associational conduct. Parades or marches organized in haste have no less First Amendment protection than those planned out months in advance. Spontaneous associations, ill-organized grass roots movements, and similarly non-bureaucratic groupings are nowhere excluded from the First Amendment. Indeed, it was precisely these kinds of groups—like those resisting British rule in colonial times—that were most in the Framers' minds when the First Amendment was drafted.[16]

The Massachusetts courts also suggested that the Parade did not convey a sufficiently focussed or coherent message to warrant full First Amendment protection.[17] That is plainly inconsistent with the First Amendment. The Constitution affords no more protection for sound bites and single-issue tracts than for anthologies of poems, rambling speeches or "unfocussed" symposia. Nor would the First Amendment's historic protections be served by lower court and bureaucratic scrutiny of proposed messages for their "coherence."

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[16] *See*, John Nowak & Ronald Rotunda, CONSTITUTIONAL LAW §§ 16.4, 16.5 (4th ed. 1991).

[17] As the Supreme Judicial Court noted, the superior court found that the interests and viewpoints represented in the Parade were "truly catholic," 636 N.E.2d at 1296, and thus found it "impossible to discern any expressive purpose entitling the Parade to protection under First Amendment." *Id.* at 1298. The evisceration of First Amendment rights worked by this reasoning is significant: Rainbow Coalition or grassroots anti-tax parades contain a sweeping diversity of views, many in tension or contradictory—yet the state ought not therefore be permitted to require the inclusion of fascist, pro-tax or other viewpoints that the coalition organizers do not wish to include. Even assuming there was such a "coherence" requirement, the high court was wrong to defer to the superior court's findings under a "clearly erroneous" standard, *id.* at 1299, instead of conducting an independent review. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1984).

Conditioning First Amendment protections on narrowly focussed messages would also deny those who wish to convey a message the right to demonstrate, as part of that message, their connection with the wider community of interests in which they live. Ironically, GLIB asserts as one of its goals the broader public appreciation of the fact that its members are part of the larger Irish-American community. One appropriate way to do this is to organize GLIB's own parade inviting members of local sport teams, representatives of well known businesses, government agencies, etc.

Under the reasoning of the Massachusetts courts, however, inclusion of those groups would render the message so "diverse" that it would forfeit First Amendment protection. GLIB, as the price for showing the support it had won in the wider community, could be forced to allow in their march traditionalist Catholic groups identifying themselves as opposed to homosexuality; indeed, failure to admit such a group on the grounds of its religious beliefs would appear to violate the Public Accommodation Law's prohibition on discrimination based on religion, at least as interpreted by the courts below.[18] Such a result would be wholly at odds with the sound holding of *Dinkins* that it is for parade sponsors, not the state, to define their own message.

AOH has already experienced the injury that results from this kind of state intrusion. Before its rights were

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[18] Amici, of course, believe neither group should be forced to include marchers with themes the group deems inconsistent with the organizers' views, and that the Public Accommodation Law (assuming, as amici deny, that it can be applied to a privately organized parade) is more sensibly interpreted as prohibiting only discrimination against classes of people, and not discrimination about what views are expressed. As it is, the interpretation of the Public Accommodation Law by the Massachusetts courts, which is binding on this Court, *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), results in working a facially invalid regulation of private speech.

vindicated in *Dinkins*, the New York Human Rights Commission informed AOH that the Commission, not AOH, knew what the parade's message was. The Commission decided that the parade was really about "broad celebratory goals" that would not be compromised, but rather enhanced, by a more inclusive message. It based this conclusion on the fact that many contingents of varied backgrounds marched in the AOH parade. While this is true, the court in *Dinkins* rightly found that in a privately sponsored parade, the decision on what messages were or were not to be communicated was up to the sponsors.[19] AOH did not lose its rights to exclude messages deemed inconsistent with, *inter alia,* Catholic teaching, just because it allowed some marchers whose message had no bearing on Catholic teaching.

Lastly, the reasoning of the Massachusetts courts would bring about another perverse effect. Under the opinions below, the highest protection would be afforded to the most focussed, controversial, political and divisive types of speech. Minimal protections would be afforded to more subtle, generalized, but perhaps no less important messages that civic and community groups may wish to sponsor. *Cf. Roberts,* 468 U.S. at 636 (O'Connor, J., concurring). As a result, groups wishing simply to have a "family parade" or a "community celebration" would be powerless to exclude the more confrontational voices, be they the gay and lesbian advocates, the militant pro-life activist, or even political extremists, from hijacking the groups' low-key (though perhaps well attended) celebrations for the activists' own ends. *See Brandon v. Springspree, Inc.,* No. 93CA1217, 1994 WL 698685 (Colo. Ct. App. Dec. 15, 1994) (privately organized community festival had right to exclude anti-abortion minister from

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[19] This is also the clear teaching of this Court. *See, e.g., Riley v. National Fed'n of the Blind,* 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates the presumption that speakers, not the government, know best both what they want to say and how to say it.").

preaching within festival confines, especially where objection was not based on viewpoint but rather on the entire subject matter). And indeed, the instant case shows this effect at work, with the Veterans being forced to turn their Parade into a more confrontational protest even in order to secure First Amendment protection. *See South Boston Allied War Veterans Council v. Boston,* CA 94-11402-MLW, 1995 WL 40641 at *28 (D. Mass. Jan. 17, 1995). The Veterans should not be forced to turn a generally positive community event into a more pointed protest to secure their right to free speech.[20]

## III. EVEN IF IT WERE NOT FORBIDDEN VIEWPOINT DISCRIMINATION, THE INJUNCTION CANNOT BE JUSTIFIED AS THE LEAST RESTRICTIVE MEANS TO ACHIEVE A LEGITIMATE GOVERNMENTAL INTEREST

### A. Forcing the Veterans To Include GLIB Was Not the Least Restrictive Means of Achieving the Commonwealth's Asserted Policy of Preventing Discrimination on the Basis of Sexual Preference

Even if the Commonwealth were just applying a content-neutral policy, it could only burden the Veterans' First Amendment rights if it employed the least restrictive means of achieving the governmental purpose. *Roberts,* 468 U.S. at 628 ("no greater than is necessary to accomplish the State's legitimate purpose"); *Taxpayers for Vin-*

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[20] This dilemma explains both why the standards announced by the Massachusetts courts must be corrected by this Court, as well as why this case is not moot in light of the district court's recent ruling with respect to the 1995 Parade. Under that ruling, the Veterans may march so long as they have a significant and sincere element of their Parade devoted to protest of the decisions here under review. It can hardly be the Veterans' desire to celebrate St. Patrick's Day henceforth only with black flags at the head of their Parade. Only this Court, by reversing the judgment of the Supreme Judicial Court, can allow the Veterans to express their preferred message in their Parade.

*cent,* 466 U.S. at 810. The injunction plainly does not satisfy this standard. Numerous alternatives far less restrictive of the Veterans' constitutional rights existed.

The City could have granted a separate parade permit to GLIB, allowing it equal access to the public streets. Beyond this, the City could have forcefully expressed its support for GLIB and the policy of inclusion. Indeed, the City's Mayor has already indicated that the City may organize its own parade which will include GLIB.[21] Or the Commonwealth could have dispatched high officials to march together with GLIB and not with the Veterans.[22]

Any of these alternatives would have afforded GLIB at least equal access to the public streets, facilities, funds and support. But the courts chose instead to apply the Public Accommodation Law in a way that will seriously distort and suppress the Veterans' message. Rather than giving two parades equal access to the streets—each affirmatively celebrating different strands of contemporary America—the Commonwealth instead has insisted upon only *one* parade that must convey a single, officially-approved message. This is not an action designed to have the least restrictive effect on the Veterans; it requires the Veterans either to convey the state-approved policy of inclusion or remain silent.[23]

Most fundamentally, the injunction does not even arguably advance the stated policy of preventing discrimination in public accommodations. There has been no suggestion that individual gays and lesbians are excluded from the Veterans' Parade. It is only insofar as the

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[21] Michael Matza, *Boston Still Simmering Over St. Pat's Parade Flap,* PHOENIX GAZETTE, March 17, 1994, at A13.

[22] Virtually the entire New York City political hierarchy marched in a gay counterdemonstration rather than the AOH parade in 1992.

[23] Or, of course, to change the tenor of their Parade to that of protest. *See supra,* n.20 and accompanying text. This is a choice to which the Veterans cannot constitutionally be forced.

state succeeds in altering the content, message and symbolic character of the Parade that the asserted objective is advanced. This latter effort, of course, is precisely the type of viewpoint and content-based discrimination that the First Amendment forbids.

### B. In Any Event, The Parade Cannot Constitutionally Be Considered a "Public" Accommodation to Which the Commonwealth Has a Legitimate Interest in Assuring Equal Access

It is no answer for the state courts to relabel the Veterans' Parade as a "public" event or accommodation. The Veterans themselves are a private, voluntary association in the truest sense. They are a selective group, defined by their shared views of traditional Irish culture and values and by their efforts through the Parade to communicate those views and their idea of reverence for St. Patrick to the public. Indeed, in this respect, the Veterans and their Parade are a classic example of a voluntary association of private citizens seeking to communicate to the public. As De Tocqueville described: "An association consists simply in the public assent which a number of individuals give to certain doctrines and in the engagement which they contract to promote in a certain manner the spread of those doctrines." 1 A. De Tocqueville, DEMOCRACY IN AMERICA at 192.

Permitting the Commonwealth to treat the Veterans' Parade as a "public" accommodation, and thereby deny it the First Amendment protections enjoyed by private persons, would seriously compromise our constitutional freedoms. While the Parade is held in the streets—a classic "public" forum—this is wholly unrelated to the notion of a "public" accommodation. Indeed, the power of the government to limit speech is at its nadir in a true public forum. *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 959 F.2d 381, 385 (2d Cir. 1992), *rev'd on other*

*grounds,* 113 S. Ct. 2141 (1993). The state courts' theory would turn the First Amendment on its head—allowing the government the greatest latitude to regulate speech in a forum where this Court has clearly stated that its power is at its most limited.[24]

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[24] This Court's decision in *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), is instructive. There, the Court held that the First Amendment did not invalidate a California constitutional provision requiring shopping centers to permit the distribution of leaflets. The Court's holding was carefully limited in several crucial respects. First, the Court emphasized that the shopping center was "a business establishment that is open to the public to come and go as they please." *Id.* at 87. Second, the views of pamphleteers "will not likely be identified with those of the owner." *Id.* Third, "no specific message is dictated by the State to be displayed," and consequently there "is no danger of governmental discrimination for or against a particular message." *Id.* Finally, the shopping center could "disavow any connection with the [pamphleters'] message." *Id.*

The present case differs in each respect singled out by the *PruneYard* Court. A place in the Parade's order of march is not open to the public; the Parade is a structured and regulated undertaking. The fact that the Veterans have in fact liberally granted access to those whose messages they did *not* deem inconsistent with the Parade in no way changes this fact. Second, there is a significant risk that the GLIB views will either be identified with the Veterans' Parade, or that those views will alter the message conveyed by the Parade. Third, the state courts have dictated a "specific message"—namely, a "policy of inclusion"—and there is consequently a real danger of "governmental discrimination for . . . a particular message." And finally, the Veterans cannot effectively disavow the Parade's connection with GLIB's message or with the altered message that an inclusive Parade will convey.

To analogize, GLIB would have it that the Veterans are analogous to the owner in *PruneYard,* and may thus constitutionally be required by the state to allow GLIB, the "pamphleteers," to speak. The fact that it is the state handing out permits to parade on the streets belies any such comparison. The Veterans and GLIB are both "pamphleteers," and the state has no more right to force the Veterans to accept GLIB into the midst of their expressive activity than it would to condition the pamphleteers' access on their agreement to distribute only a state-approved "inclusive" array of pamphlets.

The fact that the Veterans have successfully conducted the Parade, thereby attracting large audiences and numerous participants, cannot convert them from a private association into a public entity, akin to some arm of the state. The right to free speech serves to protect the freedom of every citizen and group to make its message known, to proclaim its views, and to seek to influence others through public discourse and spectacle.[25] To remove the First Amendment's protections because these efforts are successful would be an unprecedented holding that would bring the popular rock concert, the inspiring preacher, and the appealing political party under state regulation.[26]

To be sure, this Court held in *Roberts* and *Club Association* that content-neutral state anti-discrimination legislation could constitutionally be applied to require "private" groups to admit women members. Those holdings have nothing to do with this case. First, *Roberts* and *Club Association* involved groups that did not seek to exclude members based on contrary values; as described above, that is exactly what the Veterans *are* doing. Second, neither *Roberts* nor *Club Association* involved application of legislation to alter the message communicated by a group's expressive activity;[27] in contrast, the

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[25] Amicus Curiae AOH spends great effort all through the year to proclaim a message to New York and all who wish to hear it. If one thing is clear in all this, it is that such effort is exerted to put on a spectacle *and reach an audience.*

[26] Newspapers do not lose their First Amendment protections because they reach a certain circulation, nor because they print diverse opinion pieces. And talk shows do not forfeit their constitutional right after gaining a healthy following or attracting a varied cast of participants.

[27] The *Roberts* Court emphasized that the admission of women to the Jaycees would not affect dissemination of any message that the Jaycees wished to convey: the Act was said to impose "no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing mem-

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City's action in this case does exactly this. Third, both *Roberts* and *Club Association* involved governmental efforts to eradicate discrimination in access to goods and services, including commercial benefits. In this case, participation in a parade simply does not offer the sorts of commercial benefits that existed in *Roberts* and *Club Association*.[28]

At issue here, then, is not achieving equal access to housing, employment, career opportunity, voting and the like, in which the state has a legitimate and even compelling interest, but rather one group wishing to participate in another group's expressive activity. Laudable as that goal may be for the group involved, it is not one that

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bers." 468 U.S. at 627. Likewise, in *Club Association* the Court noted that the New York Human Rights Law did not prevent the clubs from excluding individuals who do not share the views that the organization wishes to promote. 487 U.S. at 13. This case is wholly different: it does not involve state prohibition of a "private" group's bar against the admission of persons to a general membership organization solely because of their gender. Rather, it involves an organization that already admits all persons without regard to race, gender or sexual preference—but that excludes from collective expressive activity groups of individuals who hold and espouse values contrary to those of the organization.

[28] The *Roberts* Court's treatment of the governmental interest in securing equal access to "public accommodation" clearly dealt only with commercial and economic benefits, albeit broadly defined, not the right to participate in *someone else's* protected speech. This is evidenced by the types of cases relied on in *Roberts: Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (hotel accommodations); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) (employment in the apple-picking industry); *PruneYard Shopping Center v. Roberts*, 447 U.S. 74 (1980) (access to a large commercial shopping mall to distribute leaflets); *Califano v. Webster*, 430 U.S. 313 (1977) (government interest in compensating for past inequality in income justified women receiving social security benefits on basis of a higher percentage of past earnings); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (government could not discriminate against female Air Force officer in granting benefits to spouse).

the state has a compelling or permissible interest in achieving. *See Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 29 Cal. Rptr. 2d 580, 594 (Cal. Ct. App., *rev. granted*, 31 Cal. Rptr. 2d 126, 874 P.2d 901 (1994); *Invisible Empire, Ku Klux Klan v. Mayor Thurmont*, 700 F. Supp. 281, 289 (D. Md. 1988).

In sum, *Roberts* and *Club Association* involved relatively non-selective groups, that did not have particularly distinctive messages, being subjected to content-neutral state laws in order to afford important rights of equal access to individuals, without affecting the groups's communicative activities. In contrast, this case involves a selective group, that conveys a distinctive and important message, being subjected to content-based state laws that are not significantly related to assuring equal access to public facilities, and that fundamentally and deliberately compromise the group's expressive activity. The First Amendment does not permit this latter course.

## CONCLUSION

For these reasons, the judgment of the Supreme Judicial Court of Massachusetts should be reversed, with instructions to dissolve the superior court's permanent injunction, and such other relief as the Court should deem appropriate.

Respectfully submitted,

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No. 94-749

IN THE
Supreme Court of the United States
October Term, 1994

JOHN J. HURLEY, INDIVIDUALLY, AND THE SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,

*Appellants,*

*v.*

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, AN UNINCORPORATED ASSOCIATION, BY AND THROUGH, TIMOTHY DALEY, BARBRA KAY AND CATHLEEN FINN, ACTING ON THEIR OWN BEHALF AND ON BEHALF OF MEMBERS OF THE ASSOCIATION,

*Appellees.*

ON APPEAL FROM THE
SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS

# BRIEF OF BOY SCOUTS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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Boy Scouts of America, as *amicus curiae*, supports reversal of the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered in this case. 418 Mass. 238, 636 N.E.2d 1293 (1994).

## INTEREST OF THE AMICUS CURIAE

Boy Scouts of America ("Boy Scouts") is a charitable volunteer membership organization which has as its mission instilling in boys and young people the values found in the Scout Oath and Law:

### Scout Oath

On my honor I will do my best
To do my duty to God and my country
and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
mentally awake, and morally straight.

### Scout Law

A Scout is:

| | |
|---|---|
| Trustworthy | Obedient |
| Loyal | Cheerful |
| Helpful | Thrifty |
| Friendly | Brave |
| Courteous | Clean |
| Kind | Reverent |

The Boy Scouts' programs are brought to young people principally by the adult volunteer members of Boy Scouts who serve as leaders of Cub Scout Packs, Boy Scout Troops,

and Explorer Posts, acting as role models and guides for youth members. In turn, older youth members serve as leaders and models for younger members.

To ensure that members share Scouting's values, Boy Scouts has established membership requirements that all potential members must satisfy. Each potential Boy Scout must agree to live by the Scout Oath and Law. Each adult member must subscribe to the Scout Oath, the Scout Law, and Boy Scouts' Declaration of Religious Principle.

If Boy Scouts is to maintain the integrity of its message to youth, it must be able to control its own membership policies. Yet interest groups which seek to change Boy Scouts' moral and religious viewpoints have invoked federal, state and local "public accommodations" laws like the one in Massachusetts to attack Boy Scouts' membership policies and force Boy Scouts to accept those who are opposed to Scouting's moral or religious views. In addition to the federal statute, public accommodations laws in California, Illinois, New Jersey, Florida, Oregon, Connecticut, Minnesota, Pennsylvania, Washington D.C., Kansas and a number of cities have been invoked or are being invoked now to support actions against Boy Scout groups. In each of the nine administrative or court actions pending currently, the Boy Scout defendants have raised an expressive association defense. Despite Boy Scouts having devoted substantial resources to the defense of these cases -- one of which has lasted 15 years -- Boy Scouts' constitutional right to determine its own membership policies remains unsettled, and Boy Scouts remains subject to attack in one jurisdiction after another. If freedom of association cannot be enjoyed without expenditures of this magnitude, freedom of association is an empty letter.

The *Hurley* case presents issues of vital importance to all organizations which select members and participants on the basis of the organization's values and beliefs. This case provides the Court with the opportunity to clarify and thus preserve the associational freedom afforded to such organizations. The ideological battleground of today's varying moral and religious viewpoints should not be the court system, but the marketplace of ideas.

Freedom of association is the cornerstone of a free society. As Justice Douglas observed:

> A Free Society is made up of almost innumerable institutions through which views and opinions are expressed, opinion is mobilized, and social, economic, religious, educational, and political programs are formulated.

*Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 563 (1963) (Douglas, J., concurring).

Writing 160 years ago, Alexis De Tocqueville recognized both the importance of associations to American society --

> Americans of all ages, all conditions, and all dispositions, constantly form associations . . . . [In] no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America.

-- and the central role of the right of association to personal liberty:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of

> acting in common with them. The right of association therefore appears to be as almost inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

Alexis De Tocqueville, *Democracy In America*, Vol. II at 114 and Vol. I at 198, 203 (P. Bradley ed. 1945).

Today, the role of associational freedom is no less important. A half hour's browsing through the *Encyclopedia of Associations* (29th ed. Gale Research Inc. 1995), with its 22,000 listings covering only a fraction of America's associations, demonstrates more eloquently than any brief the vital role played by associations in our pluralistic society. The state has no interest in diluting or blunting the messages of voluntary associations; to the contrary, the state should nurture a climate in which collective voices can be heard.

On the basis of its extensive, if unsought, experience as to the fate of associational rights in the face of public accommodations laws, Boy Scouts is able to say that the errors of analysis by the majority of the Supreme Judicial Court of Massachusetts in *Hurley* are not isolated, but are a part of a pattern which is reflected time and again in Boy Scout cases. To assist this Court, this brief analyzes the pattern of errors which has resulted in the failure to properly recognize associational rights under the Constitution of the United States.

## SUMMARY OF ARGUMENT

The constitutional right of freedom of expressive association has not been receiving the degree of protection called for by the decisions of this Court because lower courts are misinterpreting all three elements of the test set forth in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

First, as in *Hurley*, courts have failed to recognize that groups with broad-based, popular messages are entitled to expressive associational protection to the same degree as single-issue groups with minority views. Second, as in *Hurley*, courts have limited the right to exclude unwanted messages to associations which express an explicitly contradictory message, and denied this right to associations which choose to express subtler disagreement or to maintain a neutral stance on the subject. Third, as in *Hurley*, courts have determined the existence of a compelling state interest unrelated to the suppression of ideas by looking at public accommodations statutes in the abstract, thereby failing to recognize that in circumstances such as the *Hurley* parade, the only interest present is an interest in suppressing ideas.

This case presents the Court with an opportunity to provide guidance to courts and litigants so that freedom of association may retain the integrity it requires in our constitutional scheme.

## ARGUMENT

## I.

## THE TESTS FOR DETERMINING CONSTITUTIONAL PROTECTION OF EXPRESSIVE ASSOCIATION

This Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987), set forth a framework for constitutional protection of expressive associations.[1] The membership decisions of an association cannot constitutionally be regulated if:

(1) the association is expressive, and

(2) the association's decision to exclude avoids impairment of the association's expressive goals;

unless

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1. In *Roberts*, this Court analyzed associational freedom as composed of freedom of "expressive" association and freedom of "intimate" association. These categories may not be sufficiently inclusive to cover all types of associations which this Court has described as entitled to Constitutional protection. *See, e.g., Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974), quoting with approval Justice Douglas' dissent in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (1972):

> 'The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established.'

(3) the regulation of the membership decision serves compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

*Roberts*, 468 U.S. at 622-23; *Rotary*, 481 U.S. at 548-49. The elements of this three-part test are discussed below.

### A. Defining an Expressive Association

This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622. Freedom of association is "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). It is "beyond debate that freedom to engage in association for the advancement of beliefs and ideas" is protected by the Constitution. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). *Accord Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 543-44 (1963); *Healy v. James*, 408 U.S. 169, 181 (1972).

Joining a particular group is an expression of a person's support for that group's goals and principles: The First Amendment freedom of expression "includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). As this Court has observed, freedom of association is a means by which freedom of speech can be made effective: "The ability and the opportunity to combine with others to advance one's view is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the

government." *New York State Club Association v. City of New York*, 487 U.S. 1, 13 (1988). *See also Gibson*, 372 U.S. at 563, 570 (1963) (Douglas, J., concurring).

While the right to freedom of association itself has been firmly established, this Court has not had occasion to make fine distinctions as to what constitutes expressive association, as the cases for the most part have involved either a prototypical expressive association, such as a political party, *see, e.g., Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 121-22 (1981), or a group which barely constituted an association at all, such as the group of teenagers who happened to be at the Twilight Skating Rink dance hall on a particular night. *See City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989) (holding that teenagers who "are not members of any organized association" and do not "take positions on public questions" do not constitute an expressive association).

### B. The Nexus Between Membership Policies and Associational Views

As Justice Powell has noted, "With respect to laws that prevent discrimination, much depends upon the standards by which the courts examine private decisions that are an exercise of the right of association." *Hishon v. King & Spalding*, 467 U.S. 69, 80 n.4 (1984) (Powell, J., concurring). Much depends upon the nature of the nexus an organization must demonstrate between its membership policies and its associational views in order to enjoy constitutional protection for those policies.

An essential ingredient of the right to join with others is the right to define the group's identity and purposes through membership criteria. As this Court has explained,

" 'Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.' " *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974) (quoting *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 180 (1972) (Douglas, J., dissenting)). *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977). The constitutional right to associate "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party*, 450 U.S. at 122. The exercise of this prerogative to exclude others from the group is as entitled to constitutional autonomy as is the initial decision to form the group. "Freedom of association therefore plainly supposes a freedom not to associate." *Roberts*, 468 U.S. at 623. Thus, the First Amendment equally protects citizens in exercising their "freedom to associate or not to associate with whom they please." *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 288 (1984).

This Court has described the nexus required between membership requirements and associational goals primarily in four cases -- *Democratic Party*, *Roberts*, *Rotary*, and *New York State Club Association*. In *Democratic Party*, which involved a quintessentially expressive association, this Court announced a deferential test, requiring only that the association demonstrate a relationship between the membership decision and a genuine goal of the organization, stating that "the stringency, and wisdom, of membership requirements is for the association and its members to decide -- not the courts . . ." 450 U.S. at 123 n.25.

In the context of later cases involving quasi-commercial associations conferring business advantages on members, some have argued that this Court imposed a stricter standard.

The organizations at issue in *Roberts* and *Rotary*, which essentially sold leadership skills as "goods" and business contacts and employment promotions as "privileges" and "advantages," *Roberts*, 468 U.S. at 626; *Rotary*, 481 U.S. at 549, failed to demonstrate that they would have to alter or abandon their views or activities if women were admitted as members. As shown by the fact that women already participated in the organizations, albeit with second-class stature, 468 U.S. at 613; 481 U.S. at 541, the admission of female members had no foreseeable, let alone demonstrated, impact on the organizations' expressive goals or activities. The Jaycees and the Rotary failed to demonstrate that the exclusion of women from membership had any real nexus to those organizations' views.

While the organizations involved in *Roberts* and *Rotary* clearly failed to demonstrate the relationship between membership requirements and organizational goals required by *Democratic Party*, some have argued that language in *Roberts* and *Rotary* indicates that those organizations were required to meet a higher standard. Thus, in explaining the need for associations to have freedom to limit membership, the Court in *Roberts* observed that the admission of the undesired member "may impair the ability of the original members to express only those views that brought them together." Similarly, the Court observed that the Jaycees did not contend that Minnesota's public accommodations law had been applied to them "for the purpose of hampering the organization's ability to express its views." 468 U.S. at 623-24. In *Rotary*, the Court observed that the evidence failed to show that the admission of women members "will affect in any significant way the existing members' ability to carry out their various purposes," and that the application of the law would not require Rotary to "abandon or alter" its activities. 481 U.S. at 548.

While, as shown below, these passages sometimes have been misread, *Roberts* and *Rotary* in fact do no more than impose the requirement set forth in *Democratic Party* of demonstrating a relationship between the membership requirements and the organization's goals.

Finally, in *New York State Club Association*, there had been no attempt whatever to show a link between membership policies and goals in any particular club, and this Court stated expressly, "If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end." 487 U.S. at 13. Given this statement, the Court's observation that an association might be able to show that "it will not be able to advocate its desired viewpoints nearly as effectively" if it could not limit its membership to those of the same sex or religion, *id.*, appears to be simply a restatement of the demonstrated relationship test of *Democratic Party*.

### C. Compelling State Interests Unrelated to the Suppression of Ideas

As the Court observed in *Roberts*, "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." 468 U.S. at 623. In assessing the state's justification for such an intrusion, skepticism is required, for as Justice Brandeis cautioned in *Olmstead v. United States*, 277 U.S. 438, 479 (1928), "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." That caution applies with special force where the state proposes to elevate the non-constitutional interests of one class of citizens over the constitutionally protected

right of an expressive association to adopt and enforce its own membership criteria.

Because of this concern, this Court has insisted that any attempt by the state to override First Amendment rights requires the state to prove that the public purpose sought to be achieved is not only legitimate, but "compelling," and that it cannot be achieved without impinging upon constitutional rights. *See, e.g., United States v. Lee*, 455 U.S. 252, 256-61 (1982); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *Healy v. James*, 408 U.S. 169, 184 (1972); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 461 (1958). Most recently, the Court stated in *Roberts*:

> The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve *compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive* of associational freedoms.

468 U.S. at 623 (emphasis added).

Consideration of what constitutes a compelling interest must include consideration of the nature of the activity being regulated. If the state seeks to eliminate restrictions on participation in economic activities, it deserves greater deference. *Roberts* and other cases have affirmed this concept in the context of access to employment and advancement in the commercial marketplace. *See Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 460-62 (1978). While the government's interest in regulating organizations grows with the increase in the organization's ability to control access to

basic goods, services, or jobs, the state's interest becomes far weaker when access to social recognition is the sole issue.[2]

Even if compelling, a state interest must also be "unrelated to the suppression of ideas" in order to override a constitutional right. Both *Roberts* and *Rotary* assess whether the state's interest is unrelated to the suppression of ideas by looking both at the face of the statute and at the particular situation in which the state seeks to apply the statute. *Roberts*, 468 U.S. at 624-28; *Rotary* 481 U.S. at 548-49. However, while the *Roberts* Court expressly indicated that it was examining the statute as "applied," 468 U.S. at 624, the *Rotary* Court did not, and its discussion of the state's interest in the situation under consideration is a brief one. 481 U.S. at 549. This has led some to misread the opinion as holding that the statute's facial validity is all that needs to be considered.

## II.

## THE PATTERN OF ERRORS IN READING AND APPLYING THIS COURT'S TESTS

In the context of expressive groups and would-be members who fall within protected classes because of their stated sexual orientation or religion, the application of *Roberts* by lower courts has been woefully inadequate. Mistaking differences of opinion for invidious

---

2. Racial exclusions may stand on a different footing in light of three constitutional amendments reflecting affirmative constitutional policies prohibiting racial segregation and seeking the elimination of "badges of slavery" in American society. *See, e.g., Runyon v. McCrary*, 427 U.S. 160 (1976).

discrimination, courts have misused *Roberts* to trample expression on issues of sexual morality and religious belief.

Like the majority opinion below, opinions in Boy Scout cases have erred with respect to all three elements of the test -- defining associational expression, identifying the required nexus between membership policies and expression, and assessing state interests.

### A. Defining Associational Expression

An association which sincerely seeks to promote a viewpoint on moral or religious issues is constitutionally entitled to limit membership to those who share that viewpoint. While one would have thought that this principle was sufficiently clearly established by this Court's decisions, lower courts have denied associational protection where the expressive value was one among several held by the organization, was broadly phrased, or had wide popularity and many adherents.

For example, in the face of a stipulation of the parties as to the content of the Scout Oath, the Scout Law, and the Declaration of Religious Principle -- which constitute a virtual litany of moral, educational, social, and religious values -- the trial court in *Merino v. San Diego Council of Boy Scouts of America*, No. 659236 (Cal. Super. Ct.), *appeal docketed*, No. D021969 (Cal. Ct. App. Sept. 21, 1994), concluded that, "The Boy Scouts does not exist for an 'expressive' purpose." *But see Curran v. Mt. Diablo Council of Boy Scouts of America*, 23 Cal. App. 4th 1307, 29 Cal. Rptr. 2d 580, 586, *review granted*, Cal. Rptr. 2d 126, 847 P.2d 901 (Cal. 1994). Similarly, the decision of the district

court in *Welsh v. Boy Scouts of America*, 742 F. Supp. 1413, 1431-32 (N.D. Ill. 1990), on a motion to dismiss[3] suggested that Scouting's requirement that members pledge to do their duty to God was not entitled to constitutional protection because it was nonsectarian. Again, in *Randall v. Orange County Council, Boy Scouts of America*, No. 650394 (Cal. Super. Ct. June 30, 1992), *aff'd*, 28 Cal. App. 4th 50, 28 Cal. Rptr. 2d 53, *review granted*, 31 Cal. Rptr. 2d 125, 847 P.2d 900 (Cal. 1994), the court held that Boy Scouts was not a protected association with respect to religious expression, even though the court made express findings that:

> (1) the "purposes of Scouting" are "to assist young boys in developing into worthwhile citizens by teaching them . . . reverence,"
>
> (2) "the religious aspects of scouting" are "a definite part of the program,"
>
> (3) Cub Scouts refer to "a supreme being or 'God' in . . . the Cub Scout Promise and the Scout Oath,"
>
> (4) the Cub Scout Promise is "said or practiced" at Den meetings, and
>
> (5) the "Cub Scout Promise may be a 'Code of Conduct'" for the young members.

*Randall*, No. 650394, Statement of Decision at 11-13, 15.

---

3. Three years later, after trial and appeal, the case was finally decided in favor of Boy Scouts on statutory grounds. *Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (7th Cir.), *cert. denied*, 114 S. Ct. 602 (1993).

Courts cannot subject an association with a sincere, broad-based collection of messages to less constitutional protection than a narrowly focused association. A general attempt at the "inculcation of traditional values," *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring), deserves the same protection as an effort to promote one particular value. The Constitution does not protect views only because they are unorthodox or the voices that express them only when they are strident.

Similarly, the Constitution protects a message with broad appeal just as it protects a message with limited appeal. *See Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 570 (1963) (Douglas, J., concurring) (First Amendment protects both popular and unpopular groups). A large membership does not constitute evidence that the organization's message is meaningless or somehow too watered-down to receive protection; individuals join an organization and maintain their membership because they agree with its message.

Courts cannot require that organizations cross-examine each potential member to ensure that each understands the viewpoint in exactly the same way: the Catholic Church and the Democratic Party would both fail such a test, yet each observes ordination and leadership standards, respectively, which are protected by the Constitution. Nevertheless, the court of appeal in *Randall* ruled that Boy Scouts was not entitled to associational protection because it had a large membership and admitted applicants for membership without investigation. 28 Cal. App. 4th at 54-55, 28 Cal. Rptr. 2d at 55-56. An organization which is open to those, but only those, who formally accept and subscribe to its message cannot be considered unselective as far as expression is concerned.

### B. An Expressive Association May Exclude an Unwanted Message Even If Its Own Messages Do Not, in So Many Words, Expressly Contradict the Unwanted Message

Boy Scouts' values are not a litany of negatives, but affirmations of what qualities Boy Scouts believes a good person should possess. For this reason, Boy Scouts chooses not to list what specific behavior it considers to be prohibited or immoral, including homosexual conduct. With respect to sexual morality, Boy Scouts' literature simply refers boys to their obligation to be "morally straight" in the Scout Oath and "clean" in the Scout Law, and encourages traditional family values and responsibility toward girls they will someday marry. Volunteer leaders are to provide positive role models of "morally straight" and "clean" as interpreted by Boy Scouts, and to respond appropriately to questions of sexual morality posed by youth.

In *Merino v. San Diego Council of Boy Scouts of America*, No. 659236 (Cal. Super. Ct.), *appeal docketed*, No. D021969 (Cal. Ct. App. Sept. 21, 1994), a homosexual rights advocate sought to be admitted as an adult leader of a Scouting group in San Diego, California. Merino *stipulated* that Boy Scouts expelled him based on a belief that avowing homosexuality does not conform with the requirement that an adult Scout leader subscribe to the Oath and Law:

> Because *Boy Scouts of America believes* that homosexual conduct is inconsistent with the Scout Oath and Law, Boy Scouts of America does not accept known or avowed homosexuals as adult leaders.

*Merino*, Statement of Decision at 7 (emphasis added).

Based in part on evidence that *Boy Scout Handbooks* do not "use the word 'homosexual' or any synonym thereof," the trial court rejected Boy Scouts' expressive association defense and characterized Boy Scouts' belief that a homosexual activist was not an appropriate Scouting role model as "invidious discrimination against certain individuals based on stereotyped notions." *Merino*, Statement of Decision at 16.

This ruling displays several common errors in analyzing the nexus issue. First, the court arrogated to itself the determination of the content of Boy Scouts' affirmative moral message. Second, the court treated a decision based on a conflict arising out of the expression of moral values as status-based discrimination. *See also Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 27-28 (D.C. Ct. App. 1987) (making a similar error). In fact, as the court in *Gay Law Students Association v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 487-88, 156 Cal. Rptr. 14, 32, 595 P.2d 592, 610 (1979), recognized, the act of a homosexual "coming out of the closet" and acknowledging his homosexuality is political activity. Third, the Court improperly required Boy Scouts to have a pointedly and explicitly contradictory expressive message of its own in order to entitle it to exclude Merino's message from Boy Scouts' program of moral education. However, an association is constitutionally entitled to limit its expression to the content it has chosen. *Riley v. National Federation of the Blind*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.").

Persons with overt religious and sexual viewpoints necessarily inject that expression into an association, which may or may not choose to claim that message as its own. In *Randall*, two atheist plaintiffs not only alleged that they were

atheists, but also declared their atheism and their hostility to Boy Scouts' theism in numerous television and radio interviews. They testified that they would not agree to do their duty to God, would not recite the duty-to-God portion of the Oath, and would not engage in the required duty-to-God requirements for advancing in rank. In *Merino*, plaintiff stipulated that he had publicly announced that he is a homosexual and testified to having made public statements concerning his own activism on behalf of homosexuals. These plaintiffs cannot remotely be said to have sought membership in an expressive association from an expressively neutral position. Plaintiffs such as these clearly stand for particular religious and moral views.

An organization whose very mission is to convey religious or moral views must be constitutionally protected from having to accept as members those with opposing or different views. Thus, even if the *Merino* court had been correct when it concluded that Boy Scouts stated no view concerning homosexuality or homosexual conduct, as an expressive association it should have been permitted to preserve the absence of such a message. One of Boy Scouts' adversaries has argued that Boy Scouts could exclude an avowed homosexual if it were the Anti-Homosexual League, but cannot do so as the promoter of the values in the Scout Oath and Law. This is bad constitutional law. An association has the constitutional freedom to maintain a subtly negative or neutral perspective on a moral or religious issue as well as an overt and strident one. *See Roberts*, 468 U.S. at 636 (O'Connor, J., concurring) (noting Boy Scouts' methods of "develop[ing] good morals" through "quiet persuasion, inculcation of traditional values, instruction of the young, and community service").

### C. Identifying Compelling State Interests Unrelated to the Suppression of Ideas

As this Court held in *Roberts*, state interests can overcome otherwise constitutionally-protected associational rights only when the state interests are both "compelling" and "unrelated to the suppression of ideas." *Roberts*, 468 U.S. at 623-24.

In focusing on the state's interest in enacting a law as an abstract matter rather than the state's interest in applying the law in a particular fact situation, courts have found state interests controlling when those interests were not only not compelling but also related virtually entirely to the suppression of ideas. In the context of permitting African-Americans access to food, lodging, and transportation -- the original and core concerns of public accommodations laws -- it is accurate to say that a state has a compelling interest in eliminating discrimination.

When, however, the state interprets its public accommodations law so broadly as to reach voluntary associations founded not for economic but for expressive goals, the claim of a state interest in eliminating "discrimination" is a claim to a state interest in suppressing ideas. Boy Scouts maintains membership policies which exclude atheists, agnostics and homosexual activists because their expression of ideas is in conflict with the message Boy Scouts seeks to send to youth, so state regulation of these policies can only be related to the suppression of Scouting's ideas.

Discrimination, despite its pejorative connotations, constitutes the generic act of deciding who one's associates will be and who they will not be, with whom one chooses to identify and with whom one chooses not to identify. While

this Court in *Roberts* clearly acknowledged the right of a group not to associate with someone in order to avoid dilution of the group's message, 468 U.S. at 623, 627-28, lower courts have often found a compelling state interest in suppressing ideas by forcing such dilution. For example, the trial court in *Randall*, noting the vigor with which Scouting parents and other volunteer leaders had defended their right to limit their association to persons who believe in God and agree to do their duty to God, concluded:

> Such an emotional desire to refrain from or avoid association with those who are different illustrates the absolute need for legislation such as California's Unruh Act.

*Randall*, Statement of Decision at 17. Similarly, the trial court in *Merino* held that Boy Scouts was required to admit a gay activist as a volunteer adult leader despite Boy Scouts' disagreement with him on the morality of homosexual conduct:

> Any impact the application of the Unruh Act has on the expressive associational rights of the Boy Scouts is justified by the compelling state interest of the Unruh Act to eliminate arbitrary discrimination.

*Merino*, Statement of Decision at 18.

Lower courts have similarly erred in deciding whether a state's interest in a particular enforcement of its public accommodations law is unrelated to the suppression of ideas, considering the law only in the abstract and failing to examine whether in the particular case there existed any interest other than an interest in suppressing ideas. Thus, in denying a motion to dismiss the complaint brought by an agnostic youth who wanted to be a Cub Scout while refusing

to take the Cub Promise to do his duty to God, the district court in *Welsh* held that the governmental interests served by the federal public accommodations law are unrelated to the suppression of ideas. 742 F. Supp. at 1433. And the trial court in *Merino*, ruling that an openly gay man had to be accepted as the Explorer Advisor to an Explorer Post, concluded that the interests served by California's Unruh Act are unrelated to the suppression of ideas. Statement of Decision at 18.

## III.

## THE COURT BELOW REACHED THE WRONG RESULT

### A. The Parade Is an Expressive Association

The *Hurley* parade group constitutes a protected expressive association. The parade group made a selection as to which messages would be included. The parade, as characterized by the trial court, "represented" diverse "interests and viewpoints," including "religious," "eleemosynary," "patriotic" and "moral" viewpoints. 418 Mass. 238, 244, 636 N.E.2d 1293, 1296. The group itself characterized its views as "traditional religious and social values." 418 Mass. at 242, 636 N.E.2d at 1295. These purposes constitute the precise purposes this Court has recognized as expressive. *See Roberts*, 468 U.S. at 622.

The fact that the parade's presentation was also lighthearted and entertaining to spectators does not indicate that the parade fails to merit protection. Neither does the popularity of the parade. 418 Mass. at 243, 247, 636 N.E.2d at 1296, 1298. The majority's opinion that broad-based

messages with broad appeal merit no constitutional protection cannot be correct if the views of the majority of Americans are to be protected. As the dissent states:

> [T]he Veterans Council *does not need a narrow or distinct theme or message* in its parade for it to be protected under the First Amendment. Both the judge and the majority try to illustrate that the parade is a public celebration with no distinct, unified theme; the implication is that it is not expressive activity, and is therefore not worthy of First Amendment protection. This analysis is erroneous. . . .

418 Mass. at 256-57, 636 N.E.2d at 1303 (Nolan, J., dissenting) (emphasis added). The parade's broad message is protected even if the sponsor does not cross-examine "each applicant" about the specifics of its message or views. 418 Mass. at 244, 636 N.E.2d at 1296. The applicants seek to include themselves in the parade because they agree with the parade's expression and view themselves as being able to play a role in that expression. If they change their outlook on the parade, they need not apply to march in upcoming years. As the dissent concludes, "We have never been in the business of protecting only internally consistent, narrowly focused, politically sensitive speech." 418 Mass. at 260, 636 N.E.2d at 1305 (Nolan, J., dissenting).

### B. A Sufficient Nexus Exists Between the Exclusion and the Expressive Association

Having passed the threshold test for an expressive association, the next determination must be that the parade group, with its religious and moral viewpoints, is entitled to determine that its viewpoints are incompatible with GLIB's

viewpoints. A sufficient nexus exists between the exclusion of GLIB and the parade as an expressive association.

### 1. The Parade Group's View

The parade group sincerely held or sincerely wished to hold "traditional religious and social values," and one method by which it demonstrated those values was "to exclude groups with sexual themes." 418 Mass. at 242, 636 N.E.2d at 1295. Consistent with these values the group had included South Boston Baptist "Bible Trolley" and Massachusetts Citizens for Life, and excluded groups which inserted unwanted political messages, such as ROAR, the Ku Klux Klan, the Massachusetts Right to Life, and a truck carrying antihomosexual signs. 418 Mass. at 244 n.10, 636 N.E.2d at 1296 n.10. The parade group apparently viewed GLIB as another unwanted political message. 418 Mass. at 242 n.8, 636 N.E.2d at 1295 n.8.

Even if the parade group had no stated view concerning homosexuality, the group had a right to preserve its neutrality or even define its view by exclusion of GLIB. As the dissent aptly observes:

> [R]egardless of whether the parade has one message, ten messages, or no message at all, if GLIB's particular message is not in the parade, it cannot constitutionally be forced on the Veterans Council.

418 Mass. at 257, 636 N.E.2d at 1303 (Nolan, J., dissenting).

### 2. GLIB Would Introduce Unwanted Views

GLIB's message is decidedly different from the parade group's messages. GLIB affirmatively states that it sought to

participate in order to take on the parade group on expressive grounds:

> GLIB's purposes are *to express* its members' pride in their dual identities as Irish or Irish-American persons who are also homosexual or bisexual, *to demonstrate* to the Irish-American community and to the gay, lesbian, and bisexual community the diversity within those respective communities, and *to show support* for the Irish-American homosexual and bisexual men and women in New York City who were seeking to participate in that city's St. Patrick's Day Parade.

418 Mass. at 241-42, 636 N.E.2d at 1295 (emphasis added).

### C. No Compelling Interest Unrelated to the Suppression of Ideas Exists

The majority below predictably justified its insertion of GLIB's message into the parade by disparaging the decision of the parade group to enforce its views through the exclusion as "discriminatory acts." 418 Mass. at 251, 636 N.E.2d at 1300.

The dissent correctly concluded, however, that insertion of GLIB as an expressive group did not serve " 'compelling state interests, unrelated to the suppression of ideas,' " and was not narrowly tailored to the "evisceration of discrimination" envisioned by the statute. 418 Mass. at 258, 636 N.E.2d at 1303-04 (Nolan, J., dissenting). As applied, the statute suppressed the speech of the parade group. As the dissent stated,

> [B]ecause the judge's decision and order require the Veterans Council to allow GLIB to express itself,

> they violate the rule that, '[where] a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law [may] erect[] no obstacle to this end.'

418 Mass. at 258-59, 636 N.E.2d at 1304 (Nolan, J., dissenting) (quoting *New York State Club Association v. City of New York*, 487 U.S. 1, 13 (1988)).

## CONCLUSION

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts should be reversed.

Respectfully submitted,

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No. 94-749

In The

# Supreme Court of the United States

October Term, 1994

JOHN J. HURLEY, *et al.*,

*Petitioners,*

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, *et al.*,

*Respondents.*

On Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

## BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, FAMILY RESEARCH COUNCIL AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICI*

The interest of each *amicus curiae* is set forth in the appendix to this brief. The letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

## STATEMENT OF THE CASE

*Amici* adopt the Statement of the Case in the Brief of Petitioners.

## SUMMARY OF ARGUMENT

This case is *not* an example of the simmering conflict between anti-discrimination laws and constitutional rights. Instead, it is truly about the content of speech. The state courts concluded that the Veterans violated the law by excluding from their parade a message they found disagreeable. Based upon their understanding of the "proper" content of speech, the state courts forced the Veterans to include this message in their own expression.

The Superior Court, affirmed by the Massachusetts Supreme Judicial Court, erroneously equated the Veterans' decision to exclude a particular message ("message discrimination") with a decision to exclude individuals bearing a statutorily protected characteristic ("trait discrimination"). This conflation is simply wrong: it is possible to care about the message but not about the messenger, and the reverse is equally true.

This erroneous equation of two distinct kinds of actions has profound constitutional implications. Banning message discrimination, even in the guise of banning trait discrimination, is patently unconstitutional. Individuals have a virtually unqualified First Amendment right to exclude from their speech messages with which they disagree. Permissible limitations upon that right do not include the content-based regulation the Superior Court imposed. In any event, an individual need not be engaged in expression or in expression with a unified theme to possess these freedoms, contrary to the state courts' decisions.

Even if one views this dispute as a "trait discrimination" case, the Superior Court's order nonetheless violates the First Amendment. Given the virtually unlimited other opportunities for speech that GLIB possesses, no "compelling necessity" requires forcing the Veterans to include GLIB's particular message in their parade. Moreover, the state courts' chosen remedy is not the least restrictive means of advancing the public accommodation statute's stated objectives, which would be served by permitting individual GLIB members to march without proclaiming their message. In light of the severe burden upon the Veterans' free speech rights, this Court should reverse the judgment and remand the case for entry of an order rendering judgment for the Veterans on the claims against them.

## ARGUMENT

### I. THE STATE COURTS' PROHIBITION OF "MESSAGE DISCRIMINATION" VIOLATES THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

#### A. The State Courts Erroneously Equated Message Discrimination with Trait Discrimination.

The Superior Court concluded that the Veterans violated the Massachusetts public accommodation statute, Mass. Gen. L. ch. 272, §§ 92A, 98, by excluding GLIB on account of its message. The court brought such "message discrimination" within the scope of the statute by simply *equating* it with "trait discrimination." The court revealed this erroneous equation of two distinct forms of "discrimination" in a number of ways.

Most directly, both the Superior Court and the Supreme Judicial Court declared that rejecting certain messages is tantamount to engaging in forbidden trait discrimination:

> The judge found that excluding groups with sexual *themes* was itself a form of discrimination in violation of the public accommodation law's prohibition against discrimination based on sexual orientation.

*Irish-American Gay, Lesbian & Bisexual Group v. City of Boston*, 418 Mass. 238, 242, 636 N.E.2d 1293, 1295 (Mass. 1994) (emphasis added).[1] The court was *not* contending

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[1] The Superior Court stated that "[e]xcluding all sexual *themes* . . . is a form of discrimination itself. Consequently, the Veterans' exclusion of GLIB under the guise of excluding all groups with sexual *themes* violates the public accommodations law's prohibition on sexual orientation discrimination." Petition

that excluding sexual themes was a *pretext* for sexual orientation discrimination, but rather that such "theme discrimination" *is* sexual orientation discrimination.

This failure to distinguish between constitutionally protected message discrimination and generally proscribable[2] trait discrimination also appears in the following: "The defendant's final position was that GLIB would be excluded because of its values and its message, *i.e.*, its members' sexual orientation." Pet. App. at B4 n. 5. The court simply equated exclusion on the basis of a message with exclusion on the basis of the messengers' sexual orientation.

The Superior Court's confusion of message discrimination and trait discrimination is evident in many other parts of its opinion. In referring to the Veterans' earlier exclusions of the Ku Klux Klan and an anti-busing group, the court distinguished those exclusions *not* on the ground that they were message-based and that the GLIB exclusion was not, but rather on the ground that the messengers in those cases did not happen to bear a trait protected by the anti-discrimination statute. Pet. App. at B7. In other words, the court's reasoning suggests that messages can be excluded when the messengers are not

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for Writ of Certiorari, Appendix B, (hereinafter "Pet. App.") at B4 n. 6 (emphasis added).

[2] There are, however, numerous situations in which prohibitions on sexual orientation discrimination would violate the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb *et seq.* (West Supp. 1994), and state constitutional provisions.

protected minorities; when the messengers are protected minorities, message discrimination is impermissible.

The apparent presence of heterosexuals in GLIB's membership ranks is also significant. (Pet. App. at B3). Given that the Veterans accordingly excluded some heterosexuals by excluding GLIB, labeling that decision "sexual orientation discrimination" makes sense only if message discrimination and trait discrimination are equated. Relatedly, the state courts focused exclusively on the rejection of GLIB *as an organization* rather than of GLIB's homosexual and bisexual members. *See, e.g.*, 418 Mass. at 242, 636 N.E.2d at 1295. Given the Superior Court's findings that GLIB was "formed to march" in the parade and that all three of its purposes were expressive (Pet. App. at B3), the courts' focus on the exclusion *of GLIB* further reveals their identification of sexual orientation discrimination with message discrimination.

The sense that this case is about the content of the parade rather than sexual orientation discrimination pervades the Superior Court's opinion. GLIB itself asserted that the Veterans (in cooperation with the City) violated their free expression rights by excluding them from the Parade. 418 Mass. at 245, 636 N.E.2d at 1297; Pet. App. at B1-B2. If GLIB itself believed that its message had nothing to do with the exclusion, it would have asserted its claims solely under the equal protection clause and the non-discrimination statute. By asserting a free expression claim, GLIB conceded that its message motivated the exclusion.

The essential thrust of the court's reasoning was that the Veterans could not exclude GLIB's message given that

it had permitted so many other messages into the parade. The court stated that "[t]he Veterans have always opted for heterogeneousness" of messages and that "the Veterans [had] fail[ed] to circumscribe the marchers' message." Pet. App. at B25. In describing the parade, the court focused upon its "diverse" "viewpoints," "myriad themes," and "eclectic" "messages." Pet. App. at B24.

The court's preliminary injunction, in addition, had little to do with sexual orientation and very much to do with GLIB's speech. The court required GLIB members to wear identifying badges or insignia, dictated the manner in which GLIB's speech would occur ("a single cloth banner carried at waist level"), prohibited the carrying of placards and posters, and prohibited the distribution of literature. Pet. App. at B26.

In short, the courts revealed, both directly and indirectly, that the Veterans violated the public accommodation statute by excluding a *message* (regardless of the messenger's orientation).

### B. The Superior Court's Order Imposes Severe Restraints Upon the Veterans' Constitutionally Protected Right to Engage in Message Discrimination.

#### 1. The First Amendment Prevents the State from Forcing Citizens to Adopt Unwanted Messages.

This Court has repeatedly recognized that the First Amendment encompasses "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 1435, 51 L. Ed.

2d 752 (1977) (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34, 63 S. Ct. 1178, 1183, 87 L. Ed. 1628 (1943)). *See also Riley v. National Fed'n of the Blind*, 487 U.S. 781, 797, 108 S. Ct. 2667, 2678, 101 L. Ed. 2d 669 (1988) (freedom of speech comprises "the decision of both what to say and what *not* to say"). Individuals have a constitutional right "to decline to foster" ideological concepts, particularly those "they find morally objectionable." *Wooley*, 430 U.S. at 714, 715.[3] The government may not "require an individual to participate in the dissemination of an ideological message." *Id.* at 713. *See also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233, 97 S. Ct. 1782, 1798, 52 L. Ed. 2d 261 (1977).

The state courts' action involves the same constitutional evil identified in these and similar cases. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974), this Court recognized that the "right of access" statutes at issue impermissibly skewed the content of public debate, observing that the statute would encourage newspapers to take a "safe course" and "avoid controversy" when discussing political candidates. 418 U.S. at 257, 94 S. Ct. at 2839. Likewise, in *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 588 (1985), this Court invalidated an administrative order requiring a utility to

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[3] *Cf. Capital Area Right to Life, Inc. v. Downtown Frankfort, Inc.*, No. 93-1201 (May 31, 1994) (O'Connor, J., dissenting from denial of petition for writ of certiorari) ("it is not clear that [government-subsidized organizations] should have any less right to exclude people from their events than any other public forum user would have to exclude others from its rally or parade").

include rebuttals to the newsletters included in utility bills. The order created strong incentives for the utility to alter its speech, forcing it "to respond when there is strong disagreement with the substance of [the rebuttals]." 475 U.S. at 15 n. 11, 106 S. Ct. at 911 n. 11 (plurality opinion).

In this case, the courts' action similarly skews the content of speech. As in *Pacific Gas*, it effectively forces parade sponsors to respond to GLIB's message. The lower courts held that GLIB's access turns on the allegedly unfocused nature of the parade's message. 418 Mass. at 243, 244, 249-50; 636 N.E.2d at 1295, 1296, 1299. This reasoning suggests that the Veterans can avoid fostering GLIB's message if they craft the parade's message to contradict GLIB's speech.

This Court in *Tornillo* and *Pacific Gas* anticipated that compelling additional speech would skew the content of the speaker's original message. That specter has materialized in this case. Since the time the Supreme Judicial Court issued its opinion, the Veterans have indicated that their 1995 parade will specifically protest the courts' effort to compel inclusion of GLIB in its 1994 parade.[4] Given these changes, and the outright cancellation of the 1994 parade, it cannot be doubted that the courts' actions have caused the Veterans to alter the content of their speech. Therefore, the state courts' judgment invades the

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[4] The Veterans successfully sought a declaratory judgment in federal district court that the changed content of their parade mandates a different result. *South Boston Allied War Veterans Council v. City of Boston*, 1995 WL 40641, 1995 U.S. Dist. LEXIS 709, C.A. No. 94-11402-MLW (D. Mass. Jan. 17, 1995).

" 'individual freedom of mind' " no less than did the unconstitutional statute in *Wooley*. 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637). This kind of "forced response is antithetical to the free discussion that the First Amendment seeks to foster." *Pacific Gas*, 475 U.S. at 16, 106 S. Ct. at 911-12 (citing *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 559, 105 S. Ct. 2218, 2230, 85 L. Ed. 2d 588 (1985)).

The fact that the Veterans themselves are not compelled actually to mouth GLIB's message does not render the courts' orders constitutional. This Court's cases have rejected any such requirement. In both *Pacific Gas* and *Tornillo*, the compelled speech originated with a third party. *Pacific Gas*, 475 U.S. at 6-7, 106 S. Ct. at 906-907; *Tornillo*, 418 U.S. at 244 n. 2, 94 S. Ct. at 2833 n. 2 (statute requires newspaper to provide right of reply by political candidate). Moreover, as stated in *Wooley*, constitutional problems arise when the government forces one "to be an *instrument*" for promoting a particular message. 430 U.S. at 715, 97 S. Ct. at 1435 (emphasis added). The Constitution is offended when an individual is required "to *participate* in the dissemination of an ideological message." 430 U.S. at 713, 97 S. Ct. at 1434 (emphasis added). Therefore, compelling the Veterans to include GLIB's message in their parade violates their rights even though spectators might understand that the Veterans disagree with GLIB's message.

### 2. This Right Is Not Contingent Upon Engaging in Expression or Upon Engaging in Expression with a Unified Theme.

The Superior Court chose not to address the Veterans' assertion that forcing them to include GLIB in their parade violated their free speech rights, analyzing only their distinct argument that the state's action impaired their right of expressive association. *See* Pet. App. at B23-25. The Superior Court rejected the expressive association argument on the improbable ground that the parade was not expressive activity and thus that the Veterans' right of expressive association was not implicated.

On appeal, the Veterans protested to the Supreme Judicial Court that the trial court had bypassed their free speech argument. 418 Mass. at 249, 636 N.E.2d at 1298-99. Remarkably, the Massachusetts high court held that this right, like the expressive association right, was not available unless the Veterans could prove that they were engaged in expressive activity. 418 Mass. at 249, 636 N.E.2d at 1299. Seizing on the Superior Court's conclusion that the parade was *not* expressive activity, the state high court concluded that the Veterans' free speech rights were not even in issue. 418 Mass. at 249-51, 636 N.E.2d at 1299-1300.

The Supreme Judicial Court's contention that one must be engaging in speech to avoid government-compelled speech is a marked departure from First Amendment precedent and a dangerous constriction of constitutional liberties. None of this Court's compelled speech cases supports or even suggests such a concept.

Indeed, in one of the leading cases in this area, *Wooley v. Maynard*, the availability of the right was plainly not contingent upon being engaged in expression. The State of New Hampshire could not force the Maynards to display the "Live Free or Die" motto on their automobile license plate, despite the fact that they were not otherwise engaged in expression. Americans are free from forced expression, not just from forced dilutions of their own speech.

Contrary to the contention of the Supreme Judicial Court, this Court's decision in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S. Ct. 3065, 83 L. Ed. 2d 221 (1984), simply does not hold that one must be engaging in expressive activity to possess First Amendment rights. That case stands for the narrower proposition that when a party claims that a government regulation impedes affirmative efforts to engage in expression, he or she must first establish that the activity in which he or she is engaging actually constitutes expression. 468 U.S. at 293 n. 5, 104 S. Ct. at 3069 n. 5.[5] This principle has no application to a compelled speech case, where there may not be a "person desiring to engage in assertedly expressive conduct." 468 U.S. at 293 n. 5, 104 S. Ct. at 3069 n. 5. The inapplicability of this aspect of *Clark* is simply one manifestation of the difference between "typical" free speech and compelled speech cases.

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[5] The Court made this statement in the context of determining whether overnight sleeping in a public park was expressive activity.

The freedom from compelled speech is available to those engaging in speech without a unified theme. The state courts concluded that the Veterans had no First Amendment rights because their parade was "eclectic," including "myriad themes" and contradictory messages. Pet. App. at B24; 636 N.E.2d at 1296, 1299-1300. The idea that a unifying theme is a prerequisite to possessing First Amendment rights is without precedent.

*Miami Herald Publishing Co. v. Tornillo,* is instructive in this regard. In *Tornillo,* this Court struck down Florida's "right of reply" statute, which compelled newspapers to provide "equal space" to political candidates they had criticized. 418 U.S. at 258, 94 S. Ct. at 2839-40. In many ways, the parade at issue in this case (as seen by the state courts) is like an op-ed page in a newspaper. Both address a variety of subject matters. Both provide a private arena for diverse messengers to espouse their views. Both contain contradictory opinions. *Tornillo* flatly contradicts the ungrounded notion that the availability of First Amendment rights depends upon engaging in monothematic speech.

Accordingly, the courts' order did implicate the Veterans' First Amendment rights, contrary to the state courts' determination.

### C. The Stated Government Interest Behind the Superior Court's Order is Impermissibly Content-Based.

Given that the state courts consciously outlawed "message discrimination," it is not surprising that they articulated a government interest directly related to the

content of speech. Expressing its distaste for the Veterans' exclusion of GLIB's message, the Superior Court declared the purpose behind its proscription of message discrimination: "a proper celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness." Pet. App. at B24. The court later declared that "[i]nclusiveness should be the hallmark of their parade." *Id.* at B28.

The Superior Court's effort to alter the content of the parade constitutes impermissible content-based regulation of speech. *Cf. New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 368 (S.D.N.Y. 1993) ("the City has attempted to change the message of the Parade and the way that message would be conveyed"). Most cases in this area pit free speech interests against government interests unrelated to the content of speech. This reflects the fortunate American circumstance that governments rarely deliberately attempt to suppress speech; most cases arise from the incidental impact on speech of regulations designed to achieve some other purpose.

This is not such a case. On a superficial level, admittedly, it appears as such: one could argue that this case involves the application of a content-neutral nondiscrimination statute having incidental effects on speech. Yet, as demonstrated above, the state courts' action amounts to a markedly different law, one that forbids the operators of public accommodations from excluding messages they dislike. And the courts have done so for a content-based reason: to achieve their idea of what the St. Patrick's Day parade should be.

There cannot be a clearer violation of the Free Speech Clause than when the government, in order to achieve a content-based objective like "diversity," forces a citizen to engage in unwanted speech. As this Court has repeatedly recognized, content-based regulations are anathema to First Amendment values.

For example, the Court struck down Florida's well-intentioned but conscious effort to shape the flow of information to its citizens. *Tornillo*, 418 U.S. at 258, 94 S. Ct. at 2839-40. Similarly, in *Pacific Gas*, 475 U.S. at 21, 106 S. Ct. at 914 (plurality op.), this Court invalidated a statute purporting to "advance free discussion" by shaping the content of information accompanying utility bills. A "content-based regulation" designed to increase the amount of information received by potential donors to charities also did not survive constitutional scrutiny. *Riley*, 487 U.S. at 798, 108 S. Ct. at 2678. Where the government directly regulates the content of speech, "the constitutional inquiry is not qualified by any analysis of governmental interests. . . . It is enough if the individual simply expresses unwillingness to be associated with" speech with which he or she disagrees. *Roberts v. United States Jaycees*, 468 U.S. 609, 683, 104 S. Ct. 3244, 3260, 82 L. Ed. 2d 462 (1984) (O'Connor, J., concurring).

In sum, the state courts' efforts to promote "inclusiveness" in the Veterans' parade falls squarely outside the scope of permissible government regulation of speech. "[T]he State cannot advance some points of view by burdening the expression of others." *Pacific Gas*, 475 U.S. at 20, 106 S. Ct. at 914 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86, 98 S. Ct. 1407,

1420-21, 55 L. Ed. 2d 707 (1978); *Buckley v. Valeo*, 424 U.S. 1, 48-49, 96 S. Ct. 612, 649, 46 L. Ed. 2d 659 (1976)).

## II. THE STATE COURTS VIOLATED THE FIRST AMENDMENT EVEN IF ONE VIEWS THIS AS A "TRAIT DISCRIMINATION" CASE.

### A. The Veterans' Constitutional Rights Remain Severely Impaired.

As discussed above, there are two ways of viewing this case: as a deliberate government effort to promote the content-based objective of "inclusiveness" by prohibiting the Veterans from excluding GLIB's message *or* as the incidental effect on speech of a non-discrimination requirement facially unrelated to the content of expression.

Regardless of how one views this case, however, the burden upon the Veterans' free speech rights remains the same. That the state courts forced the Veterans to include GLIB's message in their parade is inescapable. The substantiality of this burden turns neither upon the character of the rule the Veterans allegedly violated (the judge-made rule prohibiting message discrimination or the legislative rule prohibiting trait discrimination) nor upon the nature of the underlying government purpose (to achieve "inclusiveness" in the dissemination of messages or to afford access to a public accommodation by individuals possessing a protected trait).

Accordingly, however this Court views the instant case, it must determine whether this imposition on constitutional rights is permissible.

### B. No "Compelling Necessity" Justifies the Burden Placed Upon the Veterans' Rights.

#### 1. Government Actions That Alter the Content of Speech Must Be Justified by a "Compelling Necessity."

Recognizing the foundational importance of free speech, this Court has declared that state-mandated alterations to the content of speech shall be invalidated "absent compelling necessity." *Riley v. National Fed'n of the Blind*, 487 U.S. at 800, 108 S. Ct. at 2681. *See also Sable Communications v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836, 106 L. Ed. 2d 93 (1989).

First Amendment principles are devalued when a wide range of government interests are deemed "compelling" or "compellingly necessary." *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2233 (1993) ("[t]he compelling interest standard . . . is not 'water[ed] . . . down' but 'really means what it says' ") (Free Exercise Clause context) (citing *Employment Div. v. Smith*, 494 U.S. 872, 888, 110 S. Ct. 1595, 1605, 108 L. Ed. 2d 876 (1989)). "[T]he government's asserted interest must be truly paramount: . . . 'only those interests *of the highest order* can overbalance legitimate claims' " of constitutional rights. *Swanner v. Anchorage Equal Rights Comm'n*, 63 U.S.L.W. 3345 (U.S. Oct. 31, 1994) (No. 94-169) (Thomas, J., dissenting from denial of petition for writ of certiorari) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

This Court, particularly in the free speech area, has resisted the temptation to accept an overbroad range of

asserted interests as "compellingly necessary" abridgements of expression. *See, e.g., Riley,* 487 U.S. at 798-801, 108 S. Ct. at 2678-80 (preventing fraud in charitable donation solicitation not compellingly necessary); *Pacific Gas,* 475 U.S. at 19-20, 106 S. Ct. at 913-14 (plurality op.) (exposing ratepayers to a variety of views not compellingly necessary); *Wooley,* 430 U.S. at 714, 97 S. Ct. at 1435 (enhancing ability to identify passenger vehicles and promoting state pride not compellingly necessary); *Tornillo,* 418 U.S. at 258, 94 S. Ct. at 2839-40 (ensuring that wide variety of views reach public not compellingly necessary).

As demonstrated below, the state has not demonstrated that its asserted interest behind forcing the Veterans to foster GLIB's message is so compellingly necessary that it justifies the substantial infringement of the Veterans' constitutional rights.

### 2. The Government Has Not Demonstrated That Its Interest in Including GLIB in the Veterans' Parade Is Compelling.

The substantial imposition on the Veterans' First Amendment rights in this case is not justified given the many opportunities GLIB has to proclaim its message. In addition, Massachusetts' treatment of sexual orientation in other contexts reveals that eradicating discrimination on that basis is not a compelling government interest.

The essential function of a statute like ch. 272 is to ensure that access to the goods and services offered by public accommodations does not depend upon irrelevant characteristics. The "good" offered by a parade sponsor is

the opportunity for speech. Unlike many of the other goods and services provided by more traditional public accommodations, the opportunities for speech are abundant for GLIB. GLIB is not exclusively or even primarily at the mercy of anyone holding a virtual monopoly on a scarce resource. GLIB could sponsor its own parade, hold rallies in public parks, or distribute literature, among other things. *See Dinkins*, 814 F. Supp. at 363 (excluded gay and lesbian group sponsored own parade); *South Boston Allied War Veterans Council v. City of Boston*, 1995 WL 40641, 1995 U.S. Dist. LEXIS 709, C.A. No. 94-11402-MLW (D. Mass. Jan. 17, 1995) (noting GLIB's alternatives to marching in Veterans' parade).

In short, GLIB will still be able to proclaim its message even if the Veterans are permitted to exercise their First Amendment right to exclude the group's message. This undeniable fact undermines any argument that a "compelling necessity" justifies the lower courts' interference with the Veterans' rights.

In addition, given Massachusetts' treatment of sexual orientation in other contexts, its asserted interest in eliminating discrimination on the basis of sexual orientation is not compelling. The Massachusetts Declaration of Rights does not include sexual orientation in its list of individual characteristics entitled to equal protection: "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Mass. Const. Pt. 1, Art. 1.[6]

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[6] The provision prohibiting discrimination on the basis of sexual orientation was added to Massachusetts' anti-discrimination laws only six years ago and is limited to the context of employment, housing, credit, and public accommodations. *Sex*,

Similarly, Massachusetts does not recognize same-sex marriage. *See* 1989 Mass. Acts 516, § 19; *see generally* Mass. Gen. L. ch. 207, 209 (1987 & Supp. 1994). A host of consequences flow from this fact, all of which demonstrate that protecting sexual orientation is not a compelling government interest. Available only to those involved in a marriage relationship are the right to use the homestead, Mass. Gen. L. ch. 188, §§ 3-4, rights to dower or curtesy, *id.* ch. 189 § 1, and rights to an allowance upon the death, *id.* ch. 196, absence, *id.* ch. 200, § 10, or mental incapacitation, *id.* ch. 201, § 43, of the spouse. That all of these rights turn upon an implicit distinction between heterosexual marriages and same-sex relationships strongly suggests that eradicating sexual orientation discrimination is not a compelling government interest.

On the national level, even supporters of Massachusetts' homosexual rights legislation concede that there is no consensus on this issue. *A Critical History* at 556. The vast majority of states have not enacted similar legislation. *Id.* at 626. Given these facts, it is implausible to

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*Lies, and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 Harv. C.R.-C.L. L. Rev. 549, 559 (1991) (hereinafter *"A Critical History"*). *Cf. Swanner v. Anchorage Equal Rights Comm'n*, 63 U.S.L.W. 3345 (U.S. Oct. 31, 1994) (No. 94-169) (Thomas, J., dissenting) (eliminating race discrimination a compelling government interest given that " '[o]ver the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit social segregation and discrimination' ").

argue that the imposition on the Veterans' rights is necessitated by a compelling state interest. *Cf. Bowers v. Hardwick*, 478 U.S. 186 (1986).

Only the Superior Court considered the question whether a compelling government interest undergirds the application of the statute to the Veterans' exclusion of GLIB's message. It concluded that any infringement upon the Veterans' First Amendment rights was "justified by the State's interest in eradicating sexual orientation discrimination." Pet. App. at B25. In support of this conclusion, the Superior Court cited two cases not involving sexual orientation discrimination, *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987), and *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

Those cases do not support the conclusion that the imposition on the Veterans' rights is justified by a compelling government interest. First, these cases did not involve sexual orientation. Second, neither *Roberts* nor *Rotary International* involved a substantial impairment of constitutional rights (there, of intimate association and expressive association). *Roberts*, 468 U.S. at 621-22, 626, 104 S. Ct. at 3251, 3254; *Rotary Int'l*, 481 U.S. at 547, 548, 107 S. Ct. at 1947. In contrast, the Veterans are forced to participate in the promulgation of a message with which they disagree, something this Court has long deemed a serious interference with free speech rights. *See Riley v. National Fed'n of the Blind*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988); *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 588 (1985); *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 1435, 51 L. Ed. 2d 752 (1977); *Miami Herald Publishing Co.*

*v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974).

Moreover, significant differences between race and gender on one hand and sexual orientation on the other reveal the impropriety of deeming the state's interest in this case to be compelling. *See* Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 Notre Dame L. Rev. 393 (1994). In concluding that the government's interest in eliminating race discrimination, for example, outweighs free exercise rights, this Court described the extraordinary nature of race discrimination: "[f]ew social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination. . . . " *Bob Jones Univ. v. United States*, 461 U.S. 574, 595, 103 S. Ct. 2017, 2030, 76 L. Ed. 2d. 157 (1983). Some of this Court's most historic decisions involve race discrimination, *see, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), and "[a]n unbroken line of cases . . . establishes beyond doubt this Court's view that racial discrimination . . . violates a most fundamental national public policy, as well as rights of individuals." *Bob Jones*, 461 U.S. at 593, 103 S. Ct. at 2029. Obviously, similar statements about the issue of sexual orientation would be patently untrue.[7]

Furthermore, a conclusion that prohibiting sexual orientation discrimination is a compelling state interest

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[7] Indeed, this Court has determined that there is no fundamental right to engage in homosexual behavior. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

would have a dramatic impact upon numerous areas of the law, including religious liberty. Under the test articulated by the Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb *et seq.* (West Supp. 1994), substantial burdens upon religious exercise pass statutory muster only if justified by a compelling government interest pursued through narrowly tailored means. *Id.* at § 2000bb-1.

Given that the orthodox forms of this nation's three major religions (Christianity, Judaism, and Islam) condemn homosexuality and structure church teaching and discipline accordingly, a conclusion that eliminating sexual orientation discrimination is a compelling government interest would pose a dangerous threat to religious liberty. In short, the subordination of free speech might lead inexorably to the devaluing of the free exercise of religion. Each of these results is inconsistent with our historic constitutional values.

### C. In Any Event, the Superior Court's Order is Not the Least Restrictive Means of Achieving the Government's Interest.

Even if this Court concludes that a compelling government interest moved the state courts to impair the Veterans' free speech rights, it is nonetheless necessary to determine whether the state's chosen remedy is narrowly tailored to attaining that end. *Riley v. National Fed'n of the Blind*, 487 U.S. at 800-801, 108 S. Ct. at 2679-80; *Pacific Gas*, 475 U.S. at 19, 106 S. Ct. at 913 (plurality op.) (state may pursue compelling government interest only "through means that would not violate . . . First Amendment

rights"). *See also Roberts*, 468 U.S. at 628-29, 104 S. Ct. at 3255 (government can abridge "no more . . . freedom than is necessary to accomplish [its] purpose").

If one concludes that this case is really "about" trait discrimination rather than message discrimination, then the state courts' remedy is inescapably overbroad. A law arguably requiring access to a parade by individuals bearing a statutorily protected trait does not confer upon them the unfettered right to engage in whatever speech they desire. The statute's goals would be wholly satisfied if GLIB's members were permitted to march in the parade. Because the state courts conferred the additional right to speak freely,[8] their order is not the least restrictive means of achieving the statute's objectives.

One might respond that giving GLIB's members the right to march in the parade without proclaiming their

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[8] At one point in the Superior Court's opinion, it suggested that it was not conferring such a right: "The statute does not mandate GLIB's inclusion into the Parade; it only prevents GLIB's exclusion simply because of its members' sexual orientation." Pet. App. at B25. This suggests that the Veterans had a right to exclude GLIB for other, legitimate reasons. (Yet, given the court's finding that excluding GLIB because of its message *is* excluding GLIB because of its members' sexual orientation, the court's apparent recognition of the Veterans' rights is illusory.) However, the court's order entirely precluded them from exercising that right: "It is further ORDERED that the defendant Veterans Council *shall allow plaintiff GLIB to participate* in the Parade in the same manner and under the same terms and conditions applicable to all other participants in the Parade." *Id.* at B29 (emphasis added). GLIB thus received the rights of *participants*, preventing the Veterans from excluding them on the basis of their message.

message is like requiring a restaurant owner to admit them but not letting them order any food. Despite its superficial appeal, this analogy does not bear scrutiny. In the restaurant example, both the decision to deny access and the decision to deny food are motivated by a consideration the statute deems impermissible: the sexual orientation of the customer. In the parade example, even if one assumes that the decision to deny access is motivated solely by a characteristic the statute deems irrelevant, a desire to restrict the content of speech once access has been achieved can be (and, in this case, was) motivated by a constitutionally protected reason: the content of the message.[9] Accordingly, faithful application of the statute need not entail permitting GLIB to proclaim its gay pride message. That the state courts did so reveals the impermissible overbreadth of their remedy.

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[9] It cannot be plausibly argued that the Veterans' actions were motivated solely by the sexual orientation of GLIB's members, or, relatedly, that their apparent desire to exclude GLIB's message from their parade was simply a pretext for excluding homosexuals and bisexuals. The record reveals that the Veterans would have allowed members of GLIB to march without a banner identifying the group. 636 N.E.2d at 1304 n. 4 (Nolan, J., dissenting).

## CONCLUSION

A central command of the Free Speech Clause is that government may not compel an individual or group to foster a message with which they disagree. Whether this compulsion is viewed as a means of directly achieving a content-based objective of "inclusiveness" or of indirectly advancing the goals of an anti-discrimination statute, the state courts' violation of this command is clear.

The judgment should be reversed and the case remanded for entry of an order rendering judgment for the Veterans on the claims against them.

Respectfully submitted,

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February 20, 1995

## APPENDIX

## STATEMENTS OF INTEREST

**The Christian Legal Society,** founded in 1961, is a nonprofit ecumenical professional association of 4,700 Christian attorneys, judges, law students and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated the protection of religious speech and exercise in this Court and in state and federal courts throughout the nation.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise. In addition, the CLS Center has filed briefs *amici curiae* joined by many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

This case potentially involves a serious threat to religious freedom. If the Court considers the relative importance of eliminating sexual orientation discrimination, a conclusion that this objective constitutes a compelling government interest could significantly undermine the right of orthodox Christians, Jews, and Muslims to exercise their faiths in a broad range of contexts.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence

(1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom is "Congress shall make no law. . . . "

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious expression.

**The Southern Baptist Convention (SBC)** is the nation's largest Protestant denomination, with over 15.4 million members in over 38,400 local churches. The Christian Life Commission (CLC) is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national conventions over the years, regarding the primacy of the principle of religious liberty, as contained in the Religion Clause of the First Amendment. CLC frequently files briefs as *amicus curiae* in important religious liberty cases, such as this case.

**Family Research Council (FRC)** conducts research and policy analysis in support of traditional Judeo-Christian values in American society. Through its publications and lobbying efforts, and through its close collaboration with such organizations as Dr. James Dobson's Focus on the Family, FRC seeks to vindicate the rights of Christians to participate as full and equal citizens in the public life of the nation.

**The National Association of Evangelicals** is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 45,000 churches from 74 denominations and serves a constituency of approximately 15 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

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In The

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October Term, 1994

JOHN J. HURLEY, *et al.*,

*Petitioners,*

*vs.*

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, *et al.*,

*Respondents.*

*On Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts*

## MOTION AND BRIEF OF AMICUS CURIAE, THE INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF PETITIONER

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*On Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts*

## MOTION OF THE INDIVIDUAL RIGHTS FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Pursuant to Rule 37.4, the Individual Rights Foundation (IRF) respectfully moves for leave to file the attached brief amicus curiae in support of the petitioners' position that the judgment entered below should be reversed. Petitioners have granted consent; respondents have denied it.

The IRF was founded in 1993 and is dedicated to educating the public about the importance of the First Amendment's free

speech and associational guarantees. To further its educational goals, the IRF conducts seminars and other public events, publishes the bimonthly *Defender,* which has a circulation of about 50,000, and files amicus curiae briefs in appellate cases involving First Amendment speech and associational rights issues. The IRF seeks to resist attempts from anywhere along the political spectrum to limit public discourse because in its view such attempts pose a serious threat to our Republican form of government.

Since the 1994 Boston St. Patrick's Day Parade did not involve state action, the IRF believes that the lower courts erred in applying the state public accommodation anti-discrimination statute to compel the sponsors of the parade to include the plaintiffs' message.

The attached brief is therefore submitted in support of the petitioners and urges the court to vacate and remand the decision below.

Respectfully submitted,

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## BRIEF OF AMICUS CURIAE, THE INDIVIDUAL RIGHTS FOUNDATION

## INTEREST OF AMICUS

The interest of the Individual Rights Foundation (IRF), as amicus curiae, is set forth in the accompanying motion.

## STATEMENT OF THE CASE

In this case the petitioners challenge the constitutionality of an injunction issued by the Massachusetts superior court

requiring the South Boston Allied War Veterans Council ("the Council"), as sponsors of the 1994 Boston St. Patrick's Day Parade, to permit an identifiable contingent of gay and lesbian marchers to participate in the Parade.[1] This amicus party adopts the Statement of the Case set forth in the appeal brief filed for the Council. Nonetheless, the IRF wishes to highlight a few points in the lower court's decisions:

1. *The Superior Court Decision.* The trial judge's opinion contained an extensive discussion of whether the City's involvement in the Parade amounted to state action and concluded that the Council did not act on behalf of the City but merely as a private party. (B. 10-22). The trial judge rejected the petitioners' contention that the Parade was an exercise of their constitutionally protected right of expressive association because participation in the Parade:

> . . . is not limited on the basis of similarity of viewpoints . . . [S]ome of the messages expressed in the Parade contradict those espoused by other participants . . . The only common theme among the participants and sponsors is their public involvement in the Parade. Indeed, the Veterans' position is paradoxical: a *proper* celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness; *an assertion of a*

1. The petitioners present two questions for review: (1) Whether the state court violated the petitioners' First Amendment rights " . . . when it compelled the petitioners to include, in their privately organized Parade, a message the petitioners deemed unwarranted and antithetical?" and (2) "Whether petitioners' refusal to include a gay, lesbian and bisexual message within a private parade can be declared unlawful discrimination by the government without violating the petitioners' First and Fourteenth Amendment rights as guaranteed by the United States Constitution?" Pet. Cert. at i.

> *right of expressive association requires focus on a specific message, theme, or group* — perhaps a Temple or Parish congregation.

(B. 24) (emphasis added).

In conclusion the trial judge stated that:

> History does not record that St. Patrick limited his ministry to heterosexuals or that General Washington's soldiers were all straight. Inclusiveness should be the hallmark of their Parade.

(B. 28).

2. *The Supreme Judicial Court (SJC) Decision.* The SJC (C. 6) sustained the trial judge's finding that inconsistent and changing explanations for excluding GLIB justified a conclusion that GLIB was excluded from the Parade because of the sexual orientation of its members. (B. 4). This was error. Disbelief of testimony never constitutes affirmative evidence for the contrary proposition for the party having the burden of proof. As the dissenting SJC justice pointed out (C. 25 n.4), there was no evidence that the Council inquired into the sexual orientation of anyone who wished to participate in the Parade. After describing the history of the Parade, the SJC found that it was a place of public accommodation and that the Massachusetts Anti-Discrimination Statute would be given a "broad interpretation". (C. 11-12).

The SJC then turned to the petitioners' First Amendment constitutional arguments and stated that:

> In order to rely on the protections of the First

> Amendment for speech or expressive association, the defendants initially had to demonstrate that the parade *truly* was an exercise of those First Amendment rights. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). This, the judge found, they did not do.

(C. 14) (emphasis added).

In a footnote, the SJC subsequently stated that it would leave open "for an appropriate case the question whether the public accommodation law permissibly could be applied to a *genuine* exercise of First Amendment rights." (C. 16 n.21) (emphasis added).

Justice Nolan dissented, stating that the trial judge violated the First Amendment in ordering that if a private group "wishes to express itself at all, it must include in its expression a particular idea, one with which the group does not agree." (C. 17).

## ARGUMENT

### I. PRELIMINARY OBSERVATIONS ABOUT FIRST AMENDMENT PROTECTIONS.

This Court is bound by the construction given by the Massachusetts SJC to the Massachusetts Anti-Discrimination Statute. *R.A.V. v. City of St. Paul Minnesota*, 504 U.S. ___, 112 S. Ct. 2538, 2542 (1992). The issue before this Court is whether the SJC's construction of the statute squares with the First Amendment.

It is important at the outset to focus on what is not at issue.

This Court does not have before it any constitutional question as to whether the State of Massachusetts may prohibit discrimination in participation in the Parade on the basis of sexual orientation.

Your amicus respectfully submits that the Massachusetts courts made two errors: First, the lower courts erred in ruling that petitioners' freedom to associate (or, more accurately, freedom not to associate) under the First Amendment did not apply because so many had participated in the Parade in the past. Second, merely because diverse interests were represented in the Parade did not mean that it had no expressive message under the First Amendment or that the Council should be forced to convey a message with which it disagreed.

## II. ASSOCIATIONAL RIGHTS UNDER THE FIRST AMENDMENT ARE NOT LIMITED TO NARROW HOMOGENOUS GROUPS WHICH HAVE RIGID RULES FOR SELECTION.

The trial judge found significant that there was "a lack of genuine selectivity" (B. 6) and noted that "some of the messages expressed in the Parade contradict those espoused by other participants." (B. 24). There are many large private groups which similarly lack "genuine selectivity" and contain members whose "messages" contradict each other. For example, the Democratic Party only two generations ago had some members who wanted to enact extensive civil rights legislation (such as, for example, Senators Hubert Humphrey and Paul Douglas) and other members who believed with equal fervor in segregation (such as Senator Richard Russell, etc.). The Democratic Party also did not have (and has not had) a consistent way of selecting its members. Merely because the Democratic Party contained members who believed in segregation as well as those who wanted extensive civil rights laws enacted does not mean that the

First Amendment right of free association does not apply. The same observation can be made for other groups, including the Boy Scouts, the Roman Catholic Church and the three principal branches of the Jewish faith (Conservative, Reform, and Orthodox).

The record in this case demonstrated that tens of thousands of people participated in the Parade, and hundreds of thousands of people viewed it. It follows necessarily that the Parade participants would include people who did not have the same messages or whose messages would contradict each other.

Freedom of association is not limited under the First Amendment to small homogenous groups who have consistent, written procedures, criteria, or standards for selecting participants. This Court has stated that "freedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S. Ct. 3244, 3252 (1984), citing *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 234-35, 97 S. Ct. 1782, 1799, 52 L. Ed. 2d 261 (1977). *See also New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) (First Amendment prohibits the state from requiring a club to include those "individuals who do not share the views that the club's members wish to promote,").

## III. THE FIRST AMENDMENT FREE SPEECH PROTECTION IS NOT LIMITED TO CONSISTENT, DISTINCT, HOMOGENOUS, OR ARTICULATE MESSAGES.

The second error made by the courts below was pointed out by the dissenting justice, in which he observed that the:

> . . . Council does not need a narrow or distinct theme or message in its parade for it

> to be protected under the First Amendment. Both the judge and the majority tried to illustrate that the parade is a public celebration with no distinct, unified theme; the implication is that it is not expressive activity, and is therefore not worthy of First Amendment Protection.

(C. 21).

As the dissenting justice further points out, " . . . regardless of whether the parade has one message, ten messages, or no message at all, if GLIB's particular message is not on the parade, it cannot constitutionally be forced on the veterans' council." (C. 21).

The tone of the SJC opinion suggests that the First Amendment distinguishes between articulate, coherent, specific messages but provides no protection unless the First Amendment claim is "genuine." (C. n.21). The SJC cites this Court's opinion in *R.A.V. v. City of St. Paul, Minnesota,* 504 U.S. ___, 112 S. Ct. 2538, 2542-48 (1992). Your amicus respectfully submits that the opinion of the court in *R.A.V.*, while canvassing the cases under the First Amendment, provides no support for the proposition that some First Amendment claims are "genuine" and others are not. What is clear from this Court's precedents is that if the content of a communication is implicated, the State must demonstrate compelling interest to sustain the statute under the First Amendment. *R.A.V., supra,* 112 S. Ct. at 2550.

The SJC also stated that to be protected by the First Amendment " . . . the defendants initially had to demonstrate that the parade truly was an exercise of those First Amendment rights. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 n.5 (1984)." (C. 14). The SJC then states that the trial

judge's finding that the petitioners did not meet this burden was not clearly erroneous under Mass. R. Civ. P. 52(a). Concededly, footnote 5 in the *Clark* decision does state that it is the obligation "of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Id. Clark* involved demonstrators who wished to sleep overnight in Lafayette Park. The instant case, by contrast, involves a parade through the streets of Boston. Such conduct has been recognized by this Court to constitute expressive conduct. *See Hague v. Committee for Industrial Organization,* 307 U.S. 496, 515, 59 S. Ct. 954, 964 (1939) (". . . streets and parks . . . have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions").

The trial court characterized the Parade as representing diverse "interests and viewpoints," including "religious," "eleemosynary," "patriotic" and "moral" viewpoints. (C. 7). The Council characterized its views as "traditional religious and social values". (C. 5). This Court has expressly stated that:

> [W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. 468 U.S. 609, 622, 104 S. Ct. 3244, 3252 (1984).

In *Roberts* this Court upheld a Minnesota statute which was construed to prohibit the United States Jaycees from discriminating against women. The Court expressly recognized that the Minnesota statute "plainly implicated" the right of free association under the First Amendment. *Id.* Only "compelling state interests, unrelated to the suppression of ideas, that cannot

be achieved through means significantly less restrictive of associational freedoms" could sustain the statute. *Id.* The statute was found to be constitutional because the compelling interest in eradicating discrimination against female citizens justified application of the statute to the Jaycees. *Roberts, supra,* 104 S. Ct. at 3253, 468 U.S. at 623.

Uncontroverted documentary evidence in the form of a GLIB fact sheet established that the purpose of GLIB requesting participation in the Parade was to (1) "celebrate our Irish heritage as openly gay, lesbian, and bisexual individuals", (2) "support our sisters and brothers in ILGO in New York City", and (3) " . . . remind people that there are lesbians, gays, and bisexuals within all demographic areas, including people of Irish heritage". (A. 51). The fact sheet also established that GLIB was formed in early January, 1992 and that while it is open to all gay men, lesbians, and bisexuals of Irish descent, its composition also includes "others interested in Irish and Irish-American issues". (A. 57). Further, this record established that by telefax and letter dated January 14, 1993, GLIB was advised that:

> The vote that was recently taken by my client did not permit any group with any sexual themes to march was merely a formalization of the fact that my client has a traditional parade expressing its religious and social values.

(A. 49).

The order of the lower courts required the Council to convey GLIB's message over their objection. Even if the Council conveyed no message, this order is an unconstitutional infringement of the Council's First Amendment rights not to broadcast a message which it disagrees with. *See Pacific Gas and*

*Elec. v. P.U.C. of California,* 475 U.S. 1, 9-10, 106 S. Ct. 903, 908 (1986) (public utilities commission could not order utility to place newsletter of third party in billing envelope).

As the dissenting justice pointed out, there was no evidence in the record that the Council ever inquired into the sexual preference of any person intending to march in the Parade, including members of GLIB. (C. 25 n.4). If there had been such evidence, there can be no question that (although this Court not reach the point) Massachusetts would be justified in construing its public accommodations anti-discrimination statute to prohibit discrimination based upon sexual orientation of any individual who wished to participate in the Parade. *Cf. New York County Board of Ancient Order of Hibernians v. Dinkins,* 814 F. Supp. 358 (S.D.N.Y. 1993) (members of Irish Lesbian Gay Organization (ILGO) were permitted to march as individuals without a banner as guests of various parade contingents but had no constitutional right to have their message be part of New York's annual St. Patrick's Day parade which is sponsored and run by the Ancient Order of Hibernians).

What was done in Massachusetts, however, crosses the line, that is, to require that the Council broadcast a message which it does not desire to do.

## CONCLUSION

The judgment should be vacated.

Respectfully submitted,

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*On Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts*

## MOTION OF THE INDIVIDUAL RIGHTS FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OUT-OF-TIME

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*On Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts*

## MOTION OF THE INDIVIDUAL RIGHTS FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OUT-OF-TIME

Comes now the Individual Rights Foundation (the Foundation) and moves for leave to file brief as amicus curiae out-of-time. In support of its Motion, the Foundation says that the undersigned counsel was retained by the Foundation in early February and was out of state on long-scheduled business at the time the brief was due. In further support of the Motion, the Foundation says that its amicus brief is only 11 pages long and that the late filing will not prejudice the respondents or affect the date of argument.

Respectfully submitted,

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OCTOBER TERM 1994

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v.

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*Respondents.*

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**On Writ of Certiorari to the Supreme Judicial Court of The Commonwealth of Massachusetts**

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## BRIEF *AMICUS CURIAE* FOR ANTI-DEFAMATION LEAGUE, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC., LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., GAY, LESBIAN & BISEXUAL VETERANS OF AMERICA, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL CENTER FOR LESBIAN RIGHTS, PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS, AND WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

---

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JOHN J. HURLEY, *et al.*,

*Petitioners,*

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, *et al.*,

*Respondents.*

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**On Writ of Certiorari to the Supreme Judicial Court of The Commonwealth of Massachusetts**

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## BRIEF *AMICUS CURIAE* FOR ANTI-DEFAMATION LEAGUE, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC., LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., GAY, LESBIAN & BISEXUAL VETERANS OF AMERICA, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL CENTER FOR LESBIAN RIGHTS, PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS, AND WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

*Amici* are all long-standing, vigorous supporters of the First Amendment. They are equally long-standing and vigorous supporters of laws prohibiting invidious discrimination. They therefore have an interest in ensuring that the vitality of the First Amendment and of

anti-discrimination laws is not lessened by the pretextual invocation of one to avoid the force of the other. In this case, *amici* believe that the asserted conflict between these two fundamental protections is a false one because petitioners were not engaged in protected First Amendment activity as organizers of the St. Patrick's Day/Evacuation Day Parade. *Amici* therefore urge affirmance of the Massachusetts Supreme Judicial Court. If the Court takes the contrary view that this parade had expressive value -- or that all parades do -- then *amici* urge the Court to limit its holding to the parade context.

The *Anti-Defamation League* ("ADL") is one of the nation's oldest civil rights and human relations organizations, founded in 1913 to combat anti-Semitism and to promote good will among all races, ethnic groups, and religions. ADL's ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens. For eight decades the ADL has actively combated discrimination in employment, housing, education, and public accommodations.

*Disability Rights Education and Defense Fund, Inc.* ("DREDF") is a national disability civil rights organization dedicated to securing equal citizenship for Americans with disabilities. DREDF pursues its mission through education, advocacy, and law reform. In its efforts to promote the full integration of citizens with disabilities into the American mainstream, DREDF has represented and/or assisted hundreds of people with disabilities who have been denied their rights and excluded from opportunities because of false and demeaning stereotypes, and has fought to ensure that people with disabilities have the remedies necessary to vindicate their right to be free from discrimination.

*Lambda Legal Defense and Education Fund, Inc.* ("Lambda") is a national organization committed to achieving full recognition of the rights of lesbians, gay

men, and people with HIV/AIDS, through impact litigation, education, and public policy work. Lambda has defended the First Amendment rights of lesbians and gay men in many cases and has advocated for the rights of gay men and lesbians under state and local anti-discrimination laws across the country. For more than twenty years, Lambda has been a strong proponent of First Amendment freedoms and of rights of equal opportunity and has a vital interest in securing the protection of both for lesbians and gay men.

*Gay, Lesbian & Bisexual Veterans of America* ("GLBVA"), founded in 1990, is dedicated to meeting the needs and answering the concerns of active, reserve, and veteran members of the military services who are gay, lesbian, or bisexual. GLBVA's is the only national veterans organization engaged in outreach to active, reserve, and veteran servicemembers who have been marginalized because of their sexual orientation.

The *Mexican American Legal Defense and Educational Fund* ("MALDEF") is a nonprofit national civil rights organization founded in 1968 and headquartered in Los Angeles. MALDEF's principal objective is to secure and to protect the civil rights of Latinos living in he United States. MALDEF pursues this objective through litigation and advocacy primarily in the areas of education, employment, political access, immigrants' rights, language rights, and access to justice.

The *National Center for Lesbian Rights* ("NCLR"), formerly the Lesbian Rights Project, is a non-profit public interest law firm founded in 1977 and devoted to the legal concerns of women and men who encounter discrimination on the basis of sexual orientation. NCLR attorneys regularly litigate in the area of civil rights as it applies to lesbians and gay men.

The *Puerto Rican Legal Defense and Education Fund* ("PRLDEF") was founded in 1972 to protect and ensure

the civil rights of Puerto Ricans and other Latinos. PRLDEF opposes invidious discrimination in all forms. PRLDEF is a strong defender of our country's anti-discrimination laws and of the First Amendment.

The *Women's Bar Association of Massachusetts* ("WBA") is a statewide professional organization committed to the protection of the rights of women before the court system and regulatory bodies, in the state and federal legislatures, and in society generally. The WBA has filed *amicus* briefs with the state and federal courts in matters involving sex and sexual orientation discrimination, sexual harassment, and equitable treatment of women by the courts, legislatures, and regulatory bodies.

The *Women's Legal Defense Fund,* founded in 1971, is a national advocacy organization that works at the federal and state levels to develop and promote policies that help women achieve equal opportunity, quality health care, and economic security for themselves and their families.

*Amicus curiae* have obtained consent to file this brief from all parties of record, and the letter of consent has been filed with the Clerk of the Court.

## SUMMARY OF ARGUMENT

The Court has long recognized the bedrock importance of the First Amendment. But it has never held that a parade is *per se* protected by the First Amendment or that the mere assertion that an activity is expressive insulates a party from the force of other laws. Instead, the Court has required a threshold showing that the activity was in fact intended to express a viewpoint and was likely to be understood as such by others. Any other rule would create a near limitless First Amendment exception to all laws, including anti-discrimination laws enacted to fulfill this nation's promise of equality.

In this case, petitioners sought to exclude certain individuals from a privately-sponsored parade otherwise open to the entire community, *i.e.*, those who identified themselves as gay or lesbian were given the choice of either hiding their identity or staying away. *Amici* would have thought that this kind of hateful exclusion was at odds with the values of both the First Amendment and our country's anti-discrimination laws. Indeed, the lower courts in this case simply applied this Court's well-settled First Amendment jurisprudence to conclude that the exclusion was not expressive activity protected by the First Amendment. Rather, the finding of the trial judge, affirmed by the highest court of Massachusetts, was that the First Amendment was invoked in a pretextual manner. These findings of pretext, turning on witness credibility, deserve deference under any standard of review and are dispositive of the issue before the Court.

In order to evade these factual findings, petitioners ask the Court to hold as a matter of law that parades are always *per se* speech. This request is not consistent with the Court's precedents. The strong policies embedded in our anti-discrimination laws cannot be evaded simply because the conduct involves marching down a street.

*Amici* recognize that the Court may accept the invitation to hold for the first time that private parades are pure speech as a matter of law. Alternatively, the Court may conclude that the Massachusetts lower courts erred in finding as a factual matter that *this* parade was not an expressive activity of petitioners under the First Amendment. Under either of these scenarios, *amici* would freely concede that the expression of private parade organizers may necessitate the exclusion of marchers whose message is inconsistent with the expressive message or messages of the organizers because of the importance justifiably attached to allowing speakers broad latitude to define their own messages.

But even if the Court reaches this result, it should save for another day any questions about any potential tension between the First Amendment and anti-discrimination laws in other settings. This is because parades are atypical of the contexts in which anti-discrimination laws are generally applied. In discrimination cases involving the workplace, housing and most public accommodations, the issue can seldom be cast as a pure conflict of messages, and discriminatory conduct can rarely if ever be defended as a necessary adjunct to pure speech. Accordingly, the holding of this case should not purport to decide the respective weight given to First Amendment and anti-discrimination concerns in such other contexts.

## ARGUMENT

### I. UNDER TRADITIONAL FIRST AMENDMENT JURISPRUDENCE, NO FIRST AMENDMENT RIGHT IS PRESENTED IN THIS CASE.

First Amendment guarantees are at the core of a free Nation. They are in fact the guarantees that make all our other constitutional guarantees possible. *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).

Accordingly, this Court has broadly construed the First Amendment's protections, determining that they reach not only speech, *see, e.g., Cantwell*, 310 at 309-311, but also some conduct, *see, e.g., Texas v. Johnson*, 491 U.S. 397, 406 (1989), and expressive association. *See, e.g., NAACP v. Claibore Hardware Co.*, 458 U.S. 886 (1982); *Buckley v. Valeo*, 424, U.S. 1 (1976); *United Mine Workers, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967). Indeed, certain expressive activity -- including many parades -- indisputably *may* be protected under the First Amendment if "[a]n intent to convey a particularized message was present, and . . . the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (*quoted in*

*Texas v. Johnson*, 491 U.S. at 404). By the same token, the activities of certain cohesive groups or associations *may* be protected by the First Amendment if they are organized for a specific expressive purpose. *See City of Dallas v. Stanglin*, 490 U.S. 19 (1989); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988); *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984); *Hishon* v. *King & Spalding*, 467 U.S. 69, 79 (1983).

The Court has held, however, that the determination whether conduct in fact is expressive or whether the association in fact has an expressive purpose sufficient to implicate the First Amendment is a matter to be resolved under the facts and circumstances of each particular case. *Roberts,* 468 U.S. at 620. "It is . . . necessary to determine whether [an] activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence*, 418 U.S. at 409. Moreover, the Court has made clear that the party *seeking* constitutional protection for otherwise unlawful conduct must as a threshold matter establish its involvement in protected expressive activity. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 n.5 (1984). Absent this showing, the Court has ruled that the First Amendment is not implicated.

Any other rule obviously would create a gaping First Amendment exception to the violation of *any* law. For "virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose -- if only expressive of the fact that the actor disagrees with the prohibition." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576 (1991) (Scalia, J., concurring) (emphasis in original); *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (refusing to accept that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea"); *see also Johnson*,

491 U.S. at 403; *Stanglin*, 490 U.S. at 25. Thus, as this Court has explained, *every* human activity involves "some kernel of expression," but not *every* activity thus gains the extraordinary protections of the First Amendment. *Stanglin*, 490 U.S. at 25.

Under these settled principles, the Massachusetts courts correctly found that *no* First Amendment right is presented in this case and, therefore, that no collision between the First Amendment and anti-discrimination laws is presented. Rather, as the trial judge and the Massachusetts Supreme Judicial Court found, the record does not support the contention that petitioners' conduct through the parade was intended "to convey a particularized message," nor that the "likelihood was great" that their "message" would be understood by those who viewed it. *See* J.A. at C13-15; *see also Spence,* 418 U.S. at 409-11; *Johnson*, 491 U.S. at 404. Moreover, no First Amendment association right was shown because, as the state court found, it was "impossible to discern any specific expressive purpose entitling the Parade to protection . . . ." J.A. at B25; s*ee, e.g., Roberts*, 468 U.S. at 618; *New York State Club Ass'n,* 467 U.S. at 13. Although petitioners argue that the trial court improperly examined their "expression" and found it to be too garbled and broadly-focused for First Amendment protection, Petitioners' Brief at 16-19, the truth is that the court carefully examined the purported speech and found that, for the purposes of the First Amendment, petitioners did not use the parade as a vehicle *for their own expression.* J.A. at C12-C13.

Rather, the court found petitioners' invocation of the First Amendment to be pretextual. J.A. at C6 ("The [trial] judge concluded that the inconsistent and changing explanations for excluding GLIB demonstrated the 'pretextual nature' of those explanations.") This finding, based on firsthand assessments of witness credibility, deserves deference from this Court under any

standard of review. *Hernandez v. New York,* 500 U.S. 352, 366-69 (1991).

In an effort to avoid these findings of fact, petitioners propose that this Court -- for the first time -- hold as a matter of law that *every* privately sponsored parade is protected as *per se* speech under the First Amendment. They argue further that a state should be powerless to enforce an otherwise applicable anti-discrimination statute against any group sponsoring such an activity. Thus, under petitioners' view, *every* parade -- even those solely for amusement or commercial promotion -- are *always* inherently expressive and therefore exempt from anti-discrimination laws.

This argument has no support in this Court's jurisprudence. This Court has never construed the First Amendment categorically to protect any particular conduct or activity, including a parade. Furthermore, none of the cases cited by petitioners provides that all parades or marches -- or any other activities for that matter -- are *per se* protected by the First Amendment. To the contrary, this Court has held that parades are *not* "pure speech" for purposes of First Amendment protection, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969), and that while parading and marching "*may* nonetheless constitute methods of expression, entitled to First Amendment protection," that is so only if the marchers establish the existence of *expressive activity*. *Id.* (emphasis added).[1] The Court has furthermore held that "'[t]he First and Fourteenth Amendments [do not] afford the same kind of freedom

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[1] Indeed, in 1995, the Council was permitted to exclude respondents from the parade by a Federal District Court judge, who found that the Council in 1995 had the requisite expressive purpose that was absent in 1993. *South Boston Allied War Veterans Council v. City of Boston,* ___ F. Supp. ___, 1995 WL 40641 at *25 (D. Mass. Jan. 17, 1995); *see also, e.g., Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 286-90 (D. Md. 1988).

to those who would communicate ideas, or conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.'" *Id.* (*quoting Cox v. Louisiana*, 379 U.S. 536, 555 (1965)).

Petitioners concede, based on these precedents, that the expressive activity of parties claiming First Amendment protection must be examined by the court -- through an "individualized, fact-specific inquiry" -- to determine whether the activity falls within the First Amendment's protections. Petitioners' Brief at 20 (*citing Roth v. United States*, 354 U.S. 476 (1957)). Such an "inquiry" occurred in the lower courts and was resolved against petitioners. Having lost as a factual matter, petitioners now seek a *per se* rule, but they have offered the Court no persuasive reason why all parades should be declared *per se* protected by the First Amendment or why courts should conduct no factual inquiries whenever parades are at issue.

In fact, no good reason supports such a result. Judicial factfinding into the legitimacy of First Amendment claims is an important safeguard against unjustified discrimination. Furthermore, this Court has given consistently broad effect to legal efforts to curb invidious discrimination[2] and, along with the lower courts, is well-versed in determining whether explanations offered in defense of discrimination claims are pretextual. Here, the First Amendment defense found pretextual by the lower courts should not now be accepted by this Court. Accordingly, because petitioners offer no justification for departing from this Court's cases, and have not refuted the factual findings of the

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[2] Time and again, this Court has made clear that anti-discrimination statutes are part of "a firm national policy" of this country, *Bob Jones University v. United States*, 461 U.S. 574, 593 (1983), and that ensuring nondiscriminatory access and opportunities in our society is a "profoundly important goal." *Roberts*, 468 U.S. at 632 (O'Connor, J., concurring in part and concurring in judgment).

lower courts, the Court should reject petitioners' argument and affirm the decision below.

## II. IF THE COURT FINDS A FIRST AMENDMENT INTEREST PRESENTED, THE COURT SHOULD MAKE CLEAR THAT ITS HOLDING IS LIMITED TO THE CONTEXT OF PRIVATE EXPRESSIVE PARADES.

*Amici* agree that would-be participants in private, genuinely expressive parades may be excluded if their participation would conflict with the expressive purpose of the parade. Thus, for example, a gay and lesbian pride parade may exclude those bringing a message of antipathy toward lesbians and gay men.

But if the Court decides that respondents in this case were properly excluded from the parade in order to protect the integrity of the parade's message, *amici* urge the Court to limit its holding to the context of private parades. For even if the Court holds that parades are *per se* expressive or presumptively so, virtually no other public accommodation, private employer, or landlord could validly make a similar claim about its activities. Accordingly, whatever rule applies to "pure speech" or expressive parades would be ill-suited to such cases. *See, e.g., Baliko v. Stecker*, 645 A.2d 1218 (N.J. Super. Ct. App. Div. 1994) (First Amendment raised to defend sexual harassment in union picketing); *Cass v. American Properties, Inc.*, 1979 (*sic*) WL 44668 (N.D. Ill. Feb. 27, 1995) (racially discriminatory conduct under the Fair Housing Act not protected under First Amendment).

This Court has repeatedly made clear that the First Amendment cannot be used as a talisman to protect a party from the reach of anti-discrimination laws. Rather, in the absence of a clear showing that discrimatory conduct was expressive in purpose and operation, the Court has not found a First Amendment right established at all. *See, e.g., Hishon v. King & Spalding*, 467 U.S. at 78 (rejecting argument that application of Title VII in

case where female was denied a partnership "would infringe [upon the] constitutional rights of expression or association"); *Norwood v. Harrison*, 413 U.S. 455, 470 (1973) ("Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections"); *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2546 (1992) ("sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices").

No departure from these decisions should be intimated here, as it would leave the country's commitment to equal opportunity unnecessarily at risk. *See Roberts*, 468 U.S. at 634 ("The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex") (O'Connor, J., concurring in part and concurring in judgment). Accordingly, if the Court reverses in this case, it should make clear the narrowness of its holding and its continuing commitment to laws protecting equal opportunity.

## CONCLUSION

For all these reasons, the Court should affirm the lower court's decision. If the Court resolves this case against respondents, it should make clear that its holding is confined to the specific circumstances of a parade.

Respectfully submitted,

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In The

# Supreme Court of the United States

October Term, 1994

JOHN J. HURLEY, Individually, and the
SOUTH BOSTON ALLIED WAR VETERANS COUNCIL,

*Petitioners,*

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, An Unincorporated Association By and Through TIMOTHY DALEY, BARBARA KAY and CATHLEEN FINN, Acting On Their Own Behalf and On Behalf of Members of the Association,

*Respondents.*

On Writ of Certiorari to the
Supreme Judicial Court of Massachusetts

## BRIEF OF IRISH LESBIAN AND GAY ORGANIZATION AND CENTER FOR CONSTITUTIONAL RIGHTS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether the even-handed application of a content-neutral anti-discrimination statute violates the First Amendment as applied to the private organizer of a civic celebration of a public holiday?

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## INTEREST OF THE *AMICI*

The Irish Lesbian and Gay Organization ("ILGO") is an organization of Irish and Irish-American lesbians and gay men formed in 1990 to create a safe and comfortable environment for its members to meet and to address their social, cultural and political needs. ILGO has for the past four years sought to participate in a city-wide celebration of St. Patrick's Day through participation in the St. Patrick's Day Parade held in New York City (the "New York Parade"). Like the Respondent Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB"), ILGO has been refused the opportunity to participate by the New York Parade's organizers because of the identified sexual orientation of ILGO's members.[1] In the various legal proceedings related to ILGO's unsuccessful efforts to participate in the New York Parade, the New York

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[1] In one of the many fora in which the New York Parade was litigated, the New York Parade was adjudicated to be a public accommodation within the meaning of New York City's Human Rights Law. *See New York City Comm'n on Human Rights v. Ancient Order of Hibernians in America*, No. MPA-0362, slip op. at 2-3 (N.Y. City Comm'n on Human Rights Oct. 27, 1992), *appeal dismissed as moot sub nom. Beirne v. New York City Comm'n on Human Rights*, No. 29840/92 (N.Y. Sup. Ct. New York County Mar. 3, 1993) (attached as Appendix A). Similar to the Massachusetts public accommodations law at issue in this proceeding, New York City's Human Rights Law states that

> [i]t shall be an unlawful discriminatory practice for any person, being the . . . agent or employee of any place of public accommodation, . . . because of the [sexual orientation] of any person directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities, or privileges thereof, or, directly or indirectly, to publish, circulate, issue, display, post, or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of [sexual orientation].

NEW YORK, N.Y., ADMIN. CODE §§ 8-107(2), -108 (1992).

Parade organizers have consistently asserted that their First Amendment rights of free speech and expressive association override New York City's interest in prohibiting discrimination based upon sexual orientation.[2] In response, for the past three years ILGO has attempted to stage a peaceful march prior to the New York Parade to protest its exclusion from the parade. Each attempt has resulted in the arrest of dozens of ILGO members and supporters.

ILGO has a keen interest in the outcome of this case. The propriety of applying Massachusetts' anti-discrimination law to Boston's St. Patrick's Day/Evacuation Day Parade (the "Parade") bears directly on the future application of New York City's Human Rights Law to the New York Parade, and this Court's decision will affect ILGO's right to participate in the New York Parade.

The Center for Constitutional Rights ("CCR") is a non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the Constitution of the United States and the Universal Declaration of Human Rights. Born in 1966 out of the civil rights struggles of people of African descent in the South, CCR, through litigation and education, has worked to make meaningful the international, constitutional, as well as statutory, rights of Blacks, Latinos, Native Americans, Asians, women, lesbians, gay males and other groups that have been historically subjected to discrimination.

Over the years, CCR has been involved in numerous cases involving violence and discrimination against or harassment of lesbians and gay males. The issues involved in this action are of paramount importance to CCR because of its above

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[2] In a related case regarding New York City's refusal to issue a permit to conduct the New York Parade, the United States District Court for the Southern District of New York agreed and determined that application of the city's Human Rights Law to the New York Parade violated the organizer's First Amendment rights. *See New York County Board of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358 (S.D.N.Y. 1993) (Duffy, J.). As a technical matter, the decision of the City Commission on Human Rights was not before Judge Duffy, but his decision was determined to have mooted the appeal of the Commission's decision.

described mission, since their resolution will have a tremendous impact on the rights of lesbians and gay people, as well as other protected classes, under anti-discrimination laws throughout the United States.

Accordingly, ILGO and CCR respectfully provide this Court with the following legal considerations relevant to the resolution of this and similar controversies. All parties have consented to the filing of this brief.

## STATEMENT OF THE CASE

The pertinent facts are fully set forth in the opinion of the Massachusetts trial court, as affirmed by the Massachusetts Supreme Judicial Court, and are summarized in Respondents' statement of the case.

## SUMMARY OF ARGUMENT

*Amici* assert that when a court's detailed analysis of the facts and circumstances surrounding a given parade reveals that the parade constitutes a civic celebration of a public holiday, is not a "protest" or the expression of a "particularized message" and otherwise possesses no other characteristics that would entitle it to exemption from state anti-discrimination laws, the parade is not the type of speech or association protected by the First Amendment and the organizers must comply with the state's anti-discrimination laws. Alternatively, even if the organizers' First Amendment rights are implicated, some limited infringement on those rights is justified in order to serve "compelling state interests unrelated to the suppression of ideas that cannot be advanced through means significantly less restrictive of associational freedoms," such as regulations aimed at the eradication of discrimination based on sexual orientation.

The notoriety, rhetoric and high emotions surrounding this case may make it appear more complicated than it really is. *Amici* believe that this case presents no different issues than those presented in all cases in which the protections and

privileges guaranteed by the First Amendment are sought; the facts and circumstances of the activity or event at issue must be examined before a determination can be made as to whether the activity or event at issue is entitled to those protections and privileges. Petitioners John J. Hurley and the South Boston Allied War Veterans Council ("Petitioners"), on the other hand, invite this Court to make entirely new law by holding that all events called parades are *per se* entitled to absolute First Amendment protection.

For this Court to do what Petitioners urge—to "state in clear terms that parades, like books and protest marches, are a form of speech *per se*, deserving of First Amendment protection from *any* abridgment, intrusion or content-based evaluation by the state, subject to the normal exceptions such as obscenity," Brief for Petitioners at 9 (emphasis added) — would result in the granting of extraordinary privileges — exemption from state laws — to an event or activity *solely* on the basis of its ambulatory nature. Furthermore, in acceding to Petitioners' request, this Court would be granting general absolution for *any* wrongs that the organizers of *any* parade may wish to commit, regardless of whether absolution is deserved or sanctioned in favor of the greater good or obtained merely by trickery. Petitioners and organizers of other civic holiday parades would then be free to exclude at their whim from future parades any ethnic or racial minority, or any other individual or group, they choose.

For this Court to accept Petitioners' arguments would be to transform the wrongdoers (the discriminators) into the victims, and the victims (GLIB) into the wrongdoers and, in so doing, to violate the principles articulated by this Court some twenty years ago; "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been afforded affirmative constitutional protections." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973).

*Amici* want to make very clear that they, like the Massachusetts Supreme Judicial Court, believe that all parades are not alike. In events involving the expressions of protests,

grievances against the government or particularized messages, or possessing other characteristics that upon examination entitle the organizers thereof to First Amendment protections, *Amici* would support the application of full First Amendment protections to the organizers of such an event. *Amici* acknowledge that most events labelled parades will (and should), in fact, be found to be expressions of speech in the full First Amendment sense of the word and, accordingly, entitled to the full protections and privileges of the First Amendment. In upholding the judgment of the Supreme Judicial Court, this Court would not open the floodgates to a wave of anti-free speech, anti-First Amendment regulation. It would merely be reaffirming the principle that the First Amendment cannot (at least in all circumstances) be used as the last refuge of the scoundrel, and its protections and privileges are not available merely for the asking or through chicanery.

*Amici* respectfully urge this Court to affirm the judgment of the Massachusetts Supreme Judicial Court. To do otherwise would be to fly in the face of this Court's own jurisprudence on these issues, as well as to ignore the particular facts of this case as found (after a thorough examination of the record and an opportunity to hear testimony) by the Massachusetts courts.

## ARGUMENT

### I. FIRST AMENDMENT JURISPRUDENCE REQUIRES THAT A COURT EXAMINE THE FACTS TO DETERMINE WHETHER AN ACTIVITY IS EXPRESSIVE SPEECH OR ASSOCIATION ENTITLED TO THE PROTECTIONS OF THE FIRST AMENDMENT

### A. *The Nature And Character Of An Event Or Association Must Be Examined By A Court*

When an abridgement of the exercise of rights protected under the First Amendment is claimed, a court must first determine whether the activity, conduct or speech at issue is

within the scope of the amendment's protection. *Texas v. Johnson*, 491 U.S. 397, 403 (1989) ("We must first determine whether [the activity] constitutes expressive conduct."). When conduct, rather than words, is involved, a court must first determine whether there is a communicative element in the conduct, and then, if so, whether it is constitutionally protected communication. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *Spence v. Washington*, 418 U.S. 405, 409 (1974) ("It is . . . necessary to determine whether [the] activity [is] sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[] . . ."). This First Amendment analysis is applied to a wide variety of activities.[3]

On at least three previous occasions, this Court has considered the application of the First Amendment to civil rights marches and demonstrations, and, even for those types of activities, the Court first evaluated whether the protest marches

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[3] *See, e.g., Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (in the "circumstances of our times," peaceful picketing in front of a business to disseminate information about a labor dispute is within the area of free discussion guaranteed by the Constitution); *Roth v. United States*, 354 U.S. 476, 481-85 (1957) (libelous utterances and obscenity are "utterly without redeeming social importance" and not within the area of constitutionally protected speech); *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (assuming that the burning of a Selective Service registration certificate was communicative conduct sufficient to bring into play the First Amendment); *Spence v. Washington*, 418 U.S. 405, 409-10 (1974) (considering the nature of activity, factual and environmental context, hanging an American flag upside down with a peace sign over it to protest the Vietnam War was a form of protected expression); *United States v. Grace*, 461 U.S. 171, 176 (1983) (distribution of leaflets, pamphlets and handbills and carrying picket signs protesting various political causes were expressive activities); *Texas v. Johnson*, 491 U.S. 397, 405-06 (1989) (flag burning at end of demonstration at Republican National Convention to protest Reagan's policies, in the context in which it occurred, was protected conduct considering the "expressive, political nature of this conduct"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991) (nude dancing performed for entertainment is expressive conduct "marginally" within the outer perimeters of the First Amendment).

were expressive activities. In *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969), this Court emphasized that the First Amendment does not "afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as th[at] amendment[] afford[s] to those who communicate ideas by pure speech" (*quoting Cox v. Louisiana*, 379 U.S. 536, 555 (1965)). *See also Edwards v. South Carolina*, 372 U.S. 229, 235-36 (1963) (peaceable assembly at the site of the State Government to express grievances was an exercise of First Amendment rights in "their most pristine and classic form").

The requirement that a court examine activity and circumstances to determine whether constitutional protection is warranted is identical in the face of a claim of infringement of the First Amendment's right of expressive association. This Court has written:

> The cases cited in *Roberts* recognize that "freedom of speech" means more than simply the right to talk and write. It is possible to find some kernel of expression in almost any activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.

*Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (teenage patrons of a dance hall although "associational in common parlance" did not involve the sort of expressive association that the First Amendment has been held to protect). Only two types of association are protected by the Constitution: certain "intimate human relationships" and associations "for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). Although the right of

expressive association extends to groups organized to engage in speech that does not pertain directly to politics, purely "social association" is not protected under the First Amendment. *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Each association claiming First Amendment protection must be examined to determine if it is, in fact, one of the types of association that falls within the scope of constitutional protection.

B. *The Label An Actor Places On An Event Is Not Dispositive For Purposes Of First Amendment Analysis*

There is no rule that all conduct is presumptively expressive. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). Activities are not given *per se* First Amendment protection just because the actor labels the activity as expressive speech or association. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea"); *Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (rejecting the label of expressive association that the dance hall operator attached to his patrons' activities in the dance hall). To qualify for constitutional protection, this Court has required, among other things, an intent to convey a "particularized message" and that the surrounding circumstances indicate a great likelihood that "the [intended, particularized] message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).[4] Courts have never accepted the label at-

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[4] In other contexts, courts refuse to accept the self-serving label a litigant places upon its activity, when the characterization of the activity is crucial to the application of the law and accepting a party's label would defeat the purpose of the law. *See, e.g., Field v. Trump*, 850 F.2d 938, 944 (2d Cir. 1988) (in securities law whether acquisition of shares is part of a tender offer for purposes of the Williams Act cannot be determined by "rubberstamping" the label used by the acquiror), *cert. denied*, 489 U.S. 1012 (1989).

tached by the actor seeking constitutional protection without conducting an independent First Amendment analysis. In fact, no case has been located where a court gave the label affixed to the activity by the actor much consideration at all. If the activity seeking First Amendment protection has a significant historical record, there is even less necessity to consider the actor's self-serving characterization of such activity for the purposes of a First Amendment analysis.

C. *The Massachusetts Courts Properly Examined The Facts, Nature And Characteristics Of The Parade And Concluded That It Was Not Speech Warranting First Amendment Protection*

Petitioners may now wish that they had, over the years, organized and presented a First Amendment activity, but the conclusion of the Massachusetts courts is that they had not. The Massachusetts courts made a careful analysis of the history, circumstances and characteristics of the Parade, rather than jumping to a constitutional conclusion based on its label, and concluded on the basis of such careful analysis that the Parade has assumed the character of a public, secular, celebratory civic event, subject to the general laws of the Commonwealth of Massachusetts, G.L. c.272, §§ 92A & 98 (the "anti-discrimination" or "public accommodations law") (Pet. for Cert. at B5-B9; C6-C12; C14-C15.[5]

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[5] For example, the trial court considered the lack of selectivity exerted by Petitioners over the Parade's participants and sponsors, as well as the Parade's historical roots (Pet. for Cert. at C6). Judge Flannery considered the size of the Parade, the number of spectators, and its status as "the largest New England event for Irish-Americans, their friends and well-wishers" (*Id.* at C7). He also noted that the interests and the viewpoints represented were truly universal, including commercial, religious, political, patriotic, athletic and public service. (*Id.*)

The Supreme Judicial Court's judgment carries none of the dreadful implications for freedom of association or expression that Petitioners and their supporters claim; rather, as the Supreme Judicial Court said, it involves only this particular event (*Id.* at C13 n.18). Surely there is nothing unusual or threatening about making an inquiry to determine the characteristics of an event in order to determine its constitutional status.

Here, Petitioners, in order to wrap a constitutional mantle around their illegal discrimination, assert they are entitled to put on a parade which is expressive and exclusionary. No one contests that they have such a right *if* they put on such a parade. What Judge Flannery and the Supreme Judicial Court concluded, however, based on a substantial record, was that this was not such an event; that the Parade was something else entirely, one that did not implicate any First Amendment rights and, accordingly, one that should be subject to the anti-discrimination laws of Massachusetts.

### D. *The Organizer Of A Civic Celebration Of A Public Holiday Should Not Be Exempt From State Anti-Discrimination Laws Under The First Amendment*

This Court has never decided (and should not) that civic celebrations of public holidays, such as St. Patrick's Day parades, Fourth of July parades or Thanksgiving Day parades, constitute the kind of expressive speech, conduct or association for purposes of First Amendment protection that enables a civic parade's private organizer to discriminate against potential parade participants and, in so doing, violate anti-discrimination laws. Petitioners' invitation to this Court to create a broad pronouncement that all parades are *per se* expressive speech subject to First Amendment protection should be flatly rejected. Just because Petitioners need a *per se* rule in order to prevail here, that is not a reason for this Court to alter its well-settled constitutional jurisprudence and legal principles.

*Amici* assert that when a court's detailed analysis of the facts and circumstances surrounding a given parade reveals that the parade constitutes a civic celebration of a public holiday, is not a "protest" or the expression of a "particularized message" and otherwise possesses no other characteristics that would entitle it to exemption from state anti-discrimination laws, the parade is not the type of speech or association protected by the First Amendment and the organizers must comply with the state's anti-discrimination laws. Alternatively, even if the organizers' First Amendment rights are implicated, some limited infringement of those rights is justified in order to serve "compelling state interests unrelated to the suppression of ideas that cannot be advanced through means significantly less restrictive of associational freedoms," such as regulations aimed at the eradication of discrimination based on sexual orientation. *Cf. Spence v. Washington*, 418 U.S. 405, 410-11 (1974); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984).

## II. EVEN IF A COURT CONCLUDES THAT AN ACTIVITY IS EXPRESSIVE SPEECH OR ASSOCIATION, THE ACTIVITY IS NONETHELESS SUBJECT TO REGULATION

As this Court has stated in the past:

> The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order . . . .

*Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969).

Even if an activity is determined to be the type of activity that warrants First Amendment protection, this Court has established a four-part test to determine if federal or state government regulation of the activity is justified. The regulation is justified if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction of the alleged First Amendment freedoms is no greater than is essential to further the governmental interest. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). The freedom to associate with others is also not absolute. "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623; *see also New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988).

*Amici* refer the Court to Respondents' brief for a full discussion of the application of the facts in this case to this Court's four-part test to determine if government regulation is justified.

### A. *In Enacting Anti-Discrimination Laws The Legislature Has Balanced The Competing Interests Of Eliminating Discrimination And Constitutional Protections And This Court May Give Consideration To The Legislature's Balancing*

*Amici* respectfully suggest that when balancing the competing interests of a state's regulation of discrimination and the rights afforded by the First Amendment, it is appropriate to give consideration to the state legislature's balancing of these interests. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563 (1990) (deference given to the National legislature); *Madsen v. Women's Health Center, Inc.*, __ U.S. __, 114 S.Ct. 2516, 2524 (1994) ("Ordinances represent a legislative choice regarding the promotion of particular societal inter-

ests."). *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

The Commonwealth of Massachusetts has enacted legislation designed to serve its compelling state interest in eradicating discrimination in places of public accommodation. Contrary to Petitioners' assertions, application of this legislation to the Parade satisfies the standards enunciated by this Court and any limited infringement on Petitioners' right to expressive association effected by requiring them to allow GLIB to march in the Parade is outweighed by essential, countervailing state interests and is thus constitutionally permissible.

*Roberts* is directly on point:

> The state court's articulated willingness to adopt limiting constructions that would exclude private groups from the state's reach, together with the commonly used and sufficiently precise standards it employed to determine that the Jaycees is not such a group, establish that the Act, as currently construed, does not create an unacceptable risk of application to a substantial amount of protected conduct.

*Roberts*, 468 U.S. at 630-31.

In *Roberts*, this Court rejected the claim of the Jaycees, a nonprofit organization dedicated to "the growth and development of young men's civic organizations," *id.* at 612, that their freedom of expressive association was unconstitutionally infringed by the requirement that they admit women as full voting members.[6] This Court held that Minnesota's compelling interest in eradicating discrimination through its Human

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[6] Women had previously been permitted to participate in various Jaycees activities, but were accorded only secondary membership status, which denied them certain voting and other privileges. *Roberts*, 468 U.S. at 613-14.

Rights Law outweighed any minimal intrusion on the organization's ability to engage in activities protected by the First Amendment or "to disseminate its preferred views." *Id.* at 627.

Massachusetts' public accommodations law, like Minnesota's and other similar codes adopted around the country, "reflects the [Commonwealth's] strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services." *See id.; Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). In 1989, reflecting its particular concern with eradicating sexual orientation discrimination, the Massachusetts legislature amended the public accommodations law specifically to reach such discrimination. *Cf. Gay Rights Coalition of Georgetown Univ. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) ("*Gay Rights Coalition*") (finding that District of Columbia had compelling interest in eradicating sexual orientation discrimination).

It is clear that a legislature has the power to balance the public interest in equal opportunity against the First Amendment rights of other groups or individuals. *See Roberts*, 468 U.S. 609; *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986). In *New York State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 223, 505 N.E.2d 915, 513 N.Y.S.2d 349 (1987), *aff'd*, 487 U.S. 1 (1988), for example, the New York Court of Appeals upheld, and this Court affirmed, the right of the City Council to balance competing constitutional rights, specifically finding that "compelling governmental interest, unrelated to the suppression of ideas—here the City's strong public policy to eliminate discrimination against women and minorities—manifestly justifies some infringement" against the rights of another group. To reexamine the balance between Petitioners' First Amendment rights and the Commonwealth's compelling interest in eliminating discrimination based on sexual orientation *after* finding that the Parade is a public accommodation and that the provisions of the General Laws have been breached would be to "engage in a legislative-like *ab initio* assessment of the asserted gov-

ernmental interest, [and to risk] ignoring [a] court's more traditional judicial task of comparing like cases to determine the appropriate outcome of the instant one." *Gay Rights Coalition*, 536 A.2d at 43. Here, the Massachusetts legislature, in enacting the public accommodations law, has already made its determination of where the interests lie in balancing its goal of eliminating discrimination against a discriminator's First Amendment rights to discriminate.[7]

Nor is the purpose of applying the public accommodations law to this Parade to hamper Petitioners' speech or any other speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (government regulation of expressive activity is

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[7] Moreover, the public accommodations law does not "require one private actor to 'endorse' the ideas or conduct of another." *See Gay Rights Coalition*, 536 A.2d at 17. To hold that ordering Petitioners to allow GLIB to participate is to compel the Petitioners to *endorse* homosexuality is to "defeat the plain language of the statute and simultaneously transform the [public accommodations law] into a patent invasion of the first amendment." *Id.* Petitioners are not being compelled to endorse homosexuality; they are merely being prevented from discriminating on any of the bases set forth in the public accommodations law. "[T]he Law merely prevents [the organizers] from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership." *New York State Club Ass'n v. New York City*, 487 U.S. 1, 13 (1988). In this regard, the *amicus* ACLU's reliance on *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281 (D. Md. 1988), is misplaced. The KKK parade in that case was not a "public accommodation" because, among other things, it was limited to card carrying members of the KKK. Accordingly, no statutory prohibition on discrimination was implicated, permitting a first-time balancing of conflicting constitutional rights of expressive association of the KKK superseding the First Amendment right of free speech of any other organization desiring to participate in that parade. The ACLU, in effect, mixes apples and oranges by analogizing the Parade, a public accommodation, to the KKK parade, an event which, under the criteria laid down in, among other cases, *Concord Rod & Gun Club, Inc. v. Massachusetts Commission Against Discrimination*, 402 Mass. 716, 524 N.E.2d 1364 (1988) and *Local Fin. Co. v. Massachusetts Comm'n Against Discrimination*, 355 Mass. 10, 242 N.E.2d 536 (1968), would never be found to be a "public accommodation" within the meaning of the public accommodations law.

content-neutral so long as it is justified without reference to content of regulated speech). Obviously, the public accommodations law was neither targeted at the Parade nor enacted to prevent the Parade from taking place. *Cf. Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 288 (D. Md. 1988) (evidence demonstrated nondiscrimination ordinance "was created only for the KKK with probable knowledge that the KKK would not parade at all if forced to do so with black participants").

This Court has held that the enforcement of a public accommodations law of general applicability, even if it causes "some incidental abridgment of . . . protected speech," has an effect "no greater than is necessary to accomplish the [government's] legitimate purposes." *Roberts*, 468 U.S. at 628; *cf. Ward*, 491 U.S. at 789 (alternative need not be the least restrictive one to be constitutional).[8] As with the Minnesota statute at issue in *Roberts*, the Supreme Judicial Court's application of the Commonwealth's public accommodations law to the Parade "responds precisely to the substantive problem that legitimately concerns" the Commonwealth—namely, eradicating an "act[ ] of invidious discrimination in the distribution of publicly available . . . advantages"—"and abridges no more speech or associational freedom than is necessary to accomplish that purpose." *Roberts*, 468 U.S. at

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[8] A suggestion of offering the excluded group an alternative opportunity to march as being a less restrictive means of achieving the state's compelling interest in eliminating discrimination misses the point. The Commonwealth's goal in enacting the anti-discrimination provisions of the General Laws was to eliminate discrimination, not to provide those who fall within a protected category with an alternative discrimination-free forum. *See North Shore Right to Life Comm. v. Manhasset Am. Legion*, 452 F. Supp. 834, 840 (E.D.N.Y. 1978) (court rejected the argument that anti-abortion group should hold its own separate parade after the main parade, noting that such a parade would "relegate them to an 'undignified position, behind the sweepers'"); *Irish Subcommittee v. Rhode Island Heritage Comm'n*, 646 F. Supp. 347, 358 (D.R.I. 1986) ("The availability of alternative forums for expressive activity will not, however, cure an otherwise defective content-based regulation").

628-29 (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984)).

B. *A Parade For The Civic Celebration Of A Public Holiday Is A Scarce Public Resource Subject To Regulations And Restrictions And Must Be Operated In The Public Interest*

Prior to the 1995 Parade, the Parade was a civic celebration of a public holiday. It was one of the six largest parades held in Boston annually, and the largest New England event for Irish-Americans, their friends and well-wishers (Pet. for Cert. at B9). The 400,000 to 750,000 spectators and participants in the annual Boston St. Patrick/Evacuation Day Parade heard and spoke the one message that this Parade conveyed — "It's St. Patrick's Day — everybody's Irish on St. Patrick's Day — let's party together!!" *See* Pet. for Cert.at B27 ("an open recreational event"), C7 ("providing entertainment, amusement and recreation to participants and spectators alike") & C15 ("no error . . . in finding that the parade was not used by [Petitioners] for expressive purposes"). As the Massachusetts courts found, this is not a march for civil rights sponsored by the NAACP, or for white supremacist rights sponsored by the KKK, or for any of the myriad of rights promoted by focused, specialized private organizations that use the public streets to conduct protest marches for political and social causes. *Id.* When one considers the type of parade at issue, the major celebration of St. Patrick's Day in New England, this Court's broadcasting cases, by analogy, are relevant.

There is a finite, limited number of public holiday celebrations, just as there is a finite, limited number of broadcast frequencies. Both media are directed at millions of people. Consequently, parades celebrating public holidays "constitute[] a scarce resource whose use could be regulated and rationalized only by the Government." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969). *See also Turner Broadcasting System, Inc. v. F.C.C.*, __ U.S. __, 114 S.Ct. 2445, 2457 (1994) (recognizing the continuing validity of broadcast jurisprudence where "the inherent physical limita-

tion on the number of speakers who may use the broadcast medium . . . require[s] some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees").[9]

Congress has mandated that the FCC consider the demands of the public interest in the course of granting broadcasting licenses. *Red Lion*, 395 U.S. at 379. This Court has interpreted that mandate as a responsibility to assure that broadcasters operate in the public interest. *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943). "[B]roadcast frequencies are limited and, therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias." *Red Lion*, 395 U.S. at 383 (quoting from the legislative history of an amendment to the Communications Act of 1934). Similarly, parades that are broad-based events monopolizing a locality's celebration of a particular holiday—whether it be July 4th, Thanksgiving, St. Patrick's Day or other similar days—should be viewed as a scarce public resource subject to some regulation. Parades celebrating public holidays, like the public airwaves, are a public trust; those fortunate enough to obtain the permit to organize holiday parades have obligations and responsibili

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[9] The analogy is further strengthened by the fact that local governments issue parade permits just as the federal government issues broadcasting licenses. Congress recognized that the failure to limit and regulate the airwaves resulted in chaos and a medium that would be of little use to anyone "because of the cacophony [sic] of competing voices, none of which could be clearly and predictably heard." *Red Lion, 395 U.S.* at 376-388. The practicalities and public safety concerns associated with the organization and conduct of parades warrant the view that local governments should limit and regulate parades, so long as the scheme controlling the time, place and manner of the parade is not based on the content of the parade's message and does not give a government official broad discretion that would allow arbitrary application of the regulations. *Cox v. New Hampshire*, 312 U.S. 569, 574-76 (1941); *Forsyth County, GA. v. Nationalist Movement*, __ U.S. __, 112 S.Ct. 2395, 2401 (1992).

ties to the public, like those of a broadcaster. This is not to suggest that the Parade be turned into a forum for debate on public issues like that required for public broadcasters. It is, however, in the public interest to require the holders of permits for this type of public celebration to obey anti-discrimination laws, even if it should result in a limited restraint on their First Amendment rights.[10]

The limitations on the number of frequencies for public broadcasting and the number of parades to be held on public holidays means that only a tiny fraction of those who desire to broadcast or organize a parade on a holiday will be permitted to do so. The rest, by necessity, are barred from the airways and the parade route. *Red Lion*, 395 U.S. at 388-89. This Court has held that no one has a First Amendment right to a broadcast license or to monopolize a radio frequency, and the denial of a station license when the public interest required it "is not a denial of free speech." *National Broadcasting*, 319 U.S. at 227.

Broadcasters have challenged the fairness doctrine requiring that each side of public issues be given fair coverage and related FCC rules that place restrictions on a broadcaster's First Amendment rights in an identical manner to the Petitioners' challenge here. They argued that it was "their" radio station, and "their" license, and "the First Amendment pro-

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[10] The law developed for issuing parade permits offers guidance for the development of the law for permit holders of parades celebrating public holidays. A municipality may not empower its parade licensing officials to dispense or withhold parade permits "according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community," yet Petitioners suggest that a municipality should empower the private organizer of a parade celebrating a public holiday to exclude parade participants protected by anti-discrimination laws, based on their own opinions of that participants' potential effect on the "welfare," "decency," or "morals" of the community. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969). *Amici* suggest that the same considerations underlying the restrictions on government officials issuing parade permits are relevant to parade permit holders for parades that are a city's celebration of a public holiday. *Cf. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

tects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency." *Red Lion*, 395 U.S. at 386. Broadcasters argued that the benefits of the First Amendment to say or publish whatever they think and to refuse to give equal weight to the views of those with whom they disagree, or simply don't like, should be equally available to broadcasters as they are to any other citizen. *Red Lion*, 395 U.S. at 386. For the same reasons that this Court has rejected the arguments of the broadcasters and denied them the use of the First Amendment to protect their monopolies over speech on the Nation's airways, this Court should reject Petitioners' arguments here and their attempt to use the First Amendment's protections to monopolize all speech in a city's celebration of a public holiday and to violate Massachusetts' anti-discrimination laws by their exclusion of identified lesbians, gay men and bisexuals from participation in a public holiday celebration.[11]

Other important First Amendment principles developed in broadcasting law are equally applicable here. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion*, 395 U.S. at 390. The citizens of Boston were attending a party to celebrate a holiday when they were attending the Parade for all of those years. Those citizens may very well welcome all people to attend and participate in the party and have no desire to exclude anyone from it. After all, those same citizens elected the legislators who enacted the anti-discrimination laws. The Parade may be properly characterized as "belonging" to the 750,000 citizens

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[11] By the same logic that Petitioners argue that they may legally exclud lesbians, gay men and bisexuals from "their Parade," Petitioners should b free in the future to exclude other groups of citizens at their whim. Th only limits on Petitioners' future exclusions may be their view of who they could "get away with excluding." Just as this Court would neve sanction excluding the participation of African-Americans from the Macy Thanksgiving Day Parade in New York under the ruse that this ethnic grou was not present at Plymouth, exclusion of GLIB from the Parade shou similarly not be sanctioned.

of Boston who attend each year and not the permit holder at all. There is no justification for the permit holder of this Parade to be allowed to exclusively, and without any adherence to the anti-discrimination laws, dictate to the viewers and listeners what they will be permitted to see and hear on St. Patrick's Day.

The broadcasting analogy is also useful in considering the effectiveness of an action, such as the one here, against the organizers of parades like the Parade or the New York Parade. Because it is virtually undisputed that certain parades will be entitled to First Amendment protections—including the right to exclude from the line of march those with views antithetical to the parade's organizers—the first response of the organizers of a parade found to be without First Amendment privileges will be to formulate an expressive message for the event. In formulating and disseminating this "new" message, they seek to transform their previously celebratory civic event into an event that is a vehicle for expression of their (alleged) deeply held beliefs. The Ancient Order of Hibernians (the organizers of the New York Parade) and Petitioners have each done this and each has been thus far successful. *See New York County Board of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358 (S.D.N.Y. 1993); *South Boston Allied War Veterans Council v. City of Boston*, C.A. No. 94-11402-MLW (D. Mass. Jan. 17, 1995). The ability of the parade organizers to redefine their message makes a plaintiff's attempt to obtain relief, and a court's ability to grant relief, illusory. While this may be the correct result in certain instances, it is not the correct result, we respectfully suggest, in circumstances where the organizer has a virtual monopoly on the celebration of a public holiday. In those circumstances, rather than allowing the organizers to retain their monopoly of the celebration, at the very least, consideration should be given to granting that monopoly to those willing to be inclusive. In addition, the sort of redefining that Petitioners and the Ancient Order of Hibernians in New York have done raises the issues discussed *supra*, as to whether a court, in examining a label placed on an

event by its organizers, is entitled to look behind that label to the underlying facts and circumstances of the event.

Petitioner's arguments seeking the protection of the First Amendment, and their obvious underlying reasons for seeking that protection and the freedom to discriminate, are counter to the very purpose of the First Amendment. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself *or a private licensee*." *Red Lion*, 395 U.S. at 390 (emphasis added).

The Massachusetts courts' analysis of the facts of the Parade and their legal conclusions based on these facts are well within this Court's standards and practices for First Amendment analysis and jurisprudence described above. The state courts properly determined that the Parade was not speech or expressive association protected by the First Amendment. Petitioners' alleged "message" proffered after their discriminatory conduct was challenged in the courts, was a pretext for private discrimination. This Court has long held that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). The factual findings and legal conclusions determined by the Massachusetts courts should be carefully examined by this Court, and these *amici* are confident that this Court will agree that there was no error committed.

## CONCLUSION

For the foregoing reasons, the judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

Respectfully submitted,

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## APPENDIX A

CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

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| NEW YORK CITY, COMMISSION ON HUMAN RIGHTS,<br><br>Complainant<br><br>- against-<br><br>ANCIENT ORDER OF HIBERNIANS IN AMERICA., INC.; NEW YORK STATE BOARD OF ANCIENT ORDER OF HIBERNIANS; NEW YORK COUNTY, BOARD OF ANCIENT ORDER OF HIBERNIANS; ST. PATRICK'S DAY PARADE AND CELEBRATION, COMMITTEE; and FRANCIS P. BEIRNE,<br><br>Respondents. | Complaint No. MPA-0362 |

## DECISION AND ORDER

Complainant, New York City Commission on Human Rights ("Complainant"), initiated a complaint alleging that Respondents, Ancient Order of Hibernians in America, Inc.; New York State Board of Ancient Order of Hibernians; New

York County Board of Ancient Order of Hibernians; Saint Patrick's Day Parade and Celebration Committee; and Francis P. Beirne ("Respondents"), unlawfully discriminated against the Intervenor, Irish Lesbian and Gay Organization ("ILGO"), in violation of Sections 8-107(2) and 8-108.1 of the Administrative Code of the City of New York ("Code"), by denying ILGO the privilege of marching in the New York City Saint Patrick's Day Parade ("Parade") on the basis of its members' sexual orientation.

Chief Administrative Law Judge Rosemarie Maldonado of the New York City Commission on Human Rights ("Commission") issued a Recommended Decision and Order ("RDO") finding Respondents in violation of the Code, but denying the relief requested by Complainant on the grounds that granting relief would violate Respondents' First Amendment rights.

## DECISION

The Commission's Rules of Practice empower this panel to review the recommended decision and order of the Administrative Law Judge, as well as the evidence in the record of hearing, in determining the appropriate disposition of this complaint. Commission's Rules of Practice, effective March 12, 1975, as amended, Part VII, Rule 36. The panel must determine whether there are sufficient facts in the record to support the Administrative Law Judge's decision, and whether the Administrative Law Judge has correctly applied the law to the facts. Resolution of the Commissioners, November, 1988. Based on our review of the record, and of the arguments of the parties, the Commission hereby adopts the Administrative Law Judge's Findings of Fact and Parts A and B of the Analysis of Evidence and Conclusions of Law of the RDO. As stated, herein we reverse Part C of the Analysis of Evidence and Conclusions of Law of the RDO.

In Part A the Administrative Law Judge found that this Parade is a place of public accommodation. We agree that the New York City Human Rights Law must be read broadly to honor the statue's remedial purposes. RDO at 12. We also agree that, although sponsored by a private organization, the Parade itself is clearly public. This Parade is a large broad-based, widely publicized event, in fact, "one of the largest annual celebrations on the streets of New York City." RDO at 11. It provides 150,000 participants the "'privilege' of celebrating ethnic pride by marching down Fifth Avenue on a business day." RDO at 13. Respondents also "provide the 'service' of organizing the Parade for the benefit and pleasure of all New Yorkers." RDO at 13.

Further, we confirm the Administrative Law Judge's finding in Part B that Respondents discriminated against ILGO in violation of the Code. It is clear that Respondents' decision to exclude ILGO was motivated by the sexual orientation of the organization's members.

As the Administrative Law Judge correctly concluded, finding that the Parade is a place or provider of a public accommodation and the Respondents discriminated against ILGO does not end the analysis. This case raises constitutional questions which can only be answered by balancing the City's interest in enforcing its Human Rights Law against Respondents' First Amendment interest.

After careful review, the panel finds that granting the relief requested by Complainant would not violate Respondents' First Amendment rights. The Administrative Law Judge held that granting the relief requested by Complainant would violate Respondents' First Amendment rights, i.e., free speech, expressive association and free exercise of religion. However, in her analysis the Administrative Law Judge failed to make legal distinction between a statute, regulation or government action which imposes a complete restriction on freedom of expression, associational rights or free exercise, and a generally applicable content-neutral statute or regula-

tion which, in a specific instance, imposes a minimal permissible infringement upon such freedom. Further, we find that the Administrative Law Judge failed to apply the appropriate legal principles based on this distinction.

In order to prevail, Respondents must demonstrate that application of the Human Rights Law's prohibition against discrimination on the basis of sexual orientation to its Parade procedures would unconstitutionally infringe upon Respondents' rights of free speech, expressive association and free exercise as guaranteed by the First Amendment to the United States Constitution and/or by the New York State Constitution, Article 1, Sections 1, 3, 8 and 9. We find that Respondents have failed to make such a showing.

Respondents argue that the Parade is a celebration of Irish Roman Catholic heritage (T. 242-243, 255-256, 358)[1]. They allege that among the unwritten requirements for inclusion in the Parade is that no group admitted have a political agenda or an agenda contrary to the teachings of the Roman Catholic Church (T. 221-222, 284-285, 324, 344-347, 349, 422, 569, 588-591). They argue that ILGO advocates the right to pursue a homosexual lifestyle and is thus in violation of Church doctrine (T. 233-234).

For guidance we turn to the Supreme Court's test established in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), for cases involving expressive association as well as symbolic speech. In that case, the Court held that the right to associate for expressive purposes is not absolute. *Roberts*, 468 U.S. at 623. Infringements on that right may be justified by appropriate regulations that meet the *Roberts* test. *Roberts*, 468 U.S. at 623. That test examines: (1) whether the statute

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1. Numbers in parenthesis preceded by "T" refer to pages in the hearing transcript; those preceded by "Hx" refer to the hearing officer's exhibits; those preceded by "Jx" refer to the joint exhibits; those preceded by "Ix" refer to ILGO's exhibits; those preceded by "Rx" refer to the respondents' joint exhibits.

challenged serves a compelling government interest; (2) whether that interest is unrelated to the suppression of ideas; and (3) whether enforcement of the statute is the least restrictive means of achieving the state's compelling goal. *Roberts*, 468 U.S. at 623.

We disagree with the Administrative Law Judge's analysis that, under the *Roberts* test, the relief requested by Complainant cannot be granted. Rather, we find that under this test the relief requested by Complainant must be granted.

The characteristics of the Parade define the parameters of the First Amendment rights implicated. After examining the record below and reviewing the parties' comments, we find that the St. Patrick's Day Parade is a secular event which is a celebration of a broad range of values surrounding Irish heritage. In her Findings of Fact, the Administrative Law Judge found that the Parade celebrates secular, religious, cultural, historical, civic and numerous other aspects of Irish culture. RDO, Finding of Fact 6-13, at 4-6. Respondents have define the Parade quite broadly and, by their own admission, have allowed a number of diverse groups to participate in their celebration of Irish heritage without regard to those groups' members' race, color, sex or creed. RDO, Findings of Fact 12 and 13, at 6 (*citing* T. 220, 244, 316-3, 18, 496; Jx. B, p. 1), Respondents' associational right is thus the right to associate with persons who support the broad celebratory goals of the Parade rather than, as Respondents argue, the right to associate merely with those who adhere to any one element of Irish heritage, such as Catholicism.

Having defined the associational right, we must now define the nature and weight of the state's interest. As the City's civil rights enforcement agency, the Commission has a compelling interest in enforcing the City's anti-discrimination laws. It is well recognized that a state's enforcement of its own human rights provisions satisfies a compelling government interest. *Roberts*, 468 U.S. at 623; *Gay Rights Coa-*

*lition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 37 (D.C. App. 1987).

Enforcement of anti-discrimination provisions relating to sexual orientation furthers an important and substantial governmental interest unrelated to the suppression of free expression. *See Roberts*, 468 U.S. at 624; *Georgetown*, 536 A.2d at 32. The New York City Human Rights Law is not, either in its enactment or in its enforcement, specifically directed at Respondents, but applies to all places and providers of public accommodation on a content-neutral basis.

As stated in the RDO, the legislative history of the Code shows that the provision prohibiting discrimination based on sexual orientation was enacted to address the serious problem of prejudice. The City Council found that such prejudice "has fostered a general climate of hostility and distrust, even to the point of physical violence against those perceived to be homosexual." RDO, at 28 (*citing* Local Law 2 of 1986, Section 1). The enforcement of this provision of the Human Rights Law, therefore, serves a compelling purpose in protecting important civil rights of members of the community.

Having defined the parameters of the rights implicated and having established that fighting discrimination is a compelling interest of the City, we can now address the issue of whether or not inclusion of ILGO in the Parade would infringe on Respondents' right to free speech, symbolic or otherwise. The record below and the Findings of Fact reveal that the Parade includes a broad range of persons from all walks of life and of diverse ethnic and religious groups as well as political interests. RDO, Finding of Fact 12, at 6 (*citing* T. 245, 269-270, 275-276, 496). Therefore, we cannot accept the view that the Parade conveys a message which admission of ILGO would dilute or compromise.

We find inconsistencies between the Administrative Law Judge's Findings of Fact and her application of law to

those findings in her legal analysis. For example, Respondents describe the Saint Patrick's Day Parade as a "broad based event," RDO, at 14 (*citing* Jx. A, p. 2), organized to "celebrate the fact that all Americans, native and immigrant alike, enjoy the freedom of the City on the streets of New York." RDO, Finding of Fact 11, at 5 (*citing* Jx. B., p. 1). "Those who march in the Parade are not limited to members of the Respondent organizations or to any religious denomination, race or ethnic group." RDO, Finding of Fact 12, at 6 (*citing* T. 244-245, 496). Therefore, admission of ILGO would not unconstitutionally infringe upon Respondents' rights of free speech and association because ILGO is one of many diverse groups who come together in the Parade to celebrate Irish heritage.

Obviously, the Parade means different things to different people. To some it is a show of homage to the Catholic Church and to the patron saint of Ireland. To others it is a celebration of Irish culture. To still others it is an opportunity to show unity with their Irish-American friends and neighbors. Respondents, themselves, view it as a celebration of freedom in New York City and in the United States. *See* RDO, Finding of Fact 11, at 5. ILGO's inclusion is consistent with these messages. Its members, too, wish to celebrate their Irish heritage alongside their fellow Irish-Americans and friends.

Respondents' argument that ILGO would be excluded for reasons other than the sexual orientation of its members is also without merit. We find nothing in the record to support Respondents' contention that ILGO has an ulterior motive and is attempting to use the Parade to further a political agenda. The Administrative Law Judge observed that ILGO is primarily "social in nature" and "not a political organization." RDO, Findings of Fact 1 and 2, at 3 (*citing* T. 60, 154-155). ILGO's members' objective is simply to celebrate who they are within their community. RDO, Finding of Fact 3, at 3 (*citing* T. 75-76, 157-158). Nor does the record show that

ILGO's members are incapable of adhering to the generally applicable rules of conduct and decorum in the Parade.

For the above reasons, Respondents' contention that the Parade represents symbolic speech of a type or character which would be unconstitutionally altered by the inclusion of ILGO is unpersuasive.

We hold that inclusion of ILGO would not impair Respondents' right of association. The fact that the Parade is sponsored by an Irish-Catholic organization does not change the analysis here. The right of association contemplates not merely the nature of the association, but the message conveyed or the ideas expressed by way of that association. *See Roberts*, 468 U.S. 609. Where, as here, a constitutional interest in the right of freedom to association and speech is implicated, the question is whether the state has a compelling interest, unrelated to the suppression of ideas, that cannot be achieved through less restrictive means. *Roberts*, 468 U.S. at 623 (*citing e.g., Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 91-92 (1982); *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 124 (1981); *Buckley v. Valeo*, 24 U.S. 1, 25 (1976) (per curiam); *Cousins v. Wogoda*, 419 U.S. 477, 489 (1975); *American Party of Texas v. White*, 415 U.S. 767, 780-781 (1974); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Shelton v. Tucker*, 364 U.S. 479, 486, 488 (1960)). In *Roberts*, the Supreme Court held that the Minnesota Human Rights Law satisfied the State's compelling interest in eliminating discrimination against women. *Roberts*, 468 U.S. at 623. The Court rejected the Jaycees' argument that inclusion of women as voting members would violate their associational rights, finding instead that the Jaycees' message would not be compromised or altered by giving women a voice. *Roberts*, 468 U.S. at 626-627; *see also Board of Dirs. of Rotary Intern. v. Rotary Club*, 481 U.S. 537 (1987). Similarly, inclusion of ILGO, while perhaps repugnant to some participants in the Parade, will not compromise the ideas which the Parade is intended to express.

Cases cited by the Administrative Law Judge relating to the right of expressive association involved situations in which the government's objective was to stop or prevent the expression and/or the association, or in which the effect of the government's actions would have been to eliminate or curtail it. *Gregory v. Chicago*, 394 U.S. 111 (1963) (criminal conviction arising out of peaceful civil rights demonstration reversed because activity was protected by the First Amendment); *Cox v. Louisiana*, 379 U.S. 536 (1965) (same); *Cox v. Louisiana*, 379 U.S. 559 (1965) (same); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (same); *NAACP v. Button*, 371 U.S. 415 (statute imposing certain restrictions on legal profession applied to activities of NAACP held violative of freedom of expression and association); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (statute requiring NAACP to disclose identity of members held an unconstitutional infringement of organizational and individual privacy); *Invisible Empire, KKK v. Mayor et al. of Thurmont*, 700 F. Supp. 281 (D. Md. 1988) (the objective in imposing a nondiscrimination requirement, which the KKK would not accept, was to stop the Klan's parade from occurring. The regulation was adopted specifically to impact on the Klan's planned parade).

We find that the holdings of these cases are not applicable here. Clearly, it is not the intent of this Commission to stop the St. Patrick's Day Parade. Our statutory provision prohibiting discrimination against people because of their sexual orientation was not passed specifically to address the St. Patrick's Day Parade. It was passed in 1986, years before this case arose, and applies to all public accommodations on a content-neutral basis. This case involves the issue of allowing ILGO to march in the Parade. Neither Complainant nor ILGO requests that the City revoke Respondents' parade permit or prohibit Respondents from marching.

Nor is it our intent to unduly interfere with Respondents' individual privacy rights or with Respondents' right to maintain their organization free from government intrusion or

questioning. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449. The Parade is but one event sponsored by Respondents. In fact, the Parade Committee that organizes and runs the Parade is open to persons who are not members of Respondents' organization. RDO, Finding of Fact 13, at 6 (*citing* T. 231-233). The issue in this case is the impact of the Human Rights Law on this event rather than the structure of Respondent's organization.

This decision allows for instances where a parade organizer may seek to exclude persons or groups that have an agenda inconsistent with, or contrary to, those purposes for which the parade is organized or the message which it is intended to convey. Many such events are designed to convey discrete messages, and these are entitled to the protection of the First Amendment. The parade at issue in *Invisible Empire, KKK*, 700 F. Supp. 281, is a prime example. "If ever there was a case where the membership and the message were coextensive, it is here." *Invisible Empire, KKK*, 700 F. Supp. at 289. It is not simply that the KKK parade was limited to card-carrying members of the Klan that distinguishes it from the St. Patrick's Day Parade. Rather, it is the fact that for the Klan, this exclusivity was part and parcel of the message being conveyed. That the exclusivity is part of the message is determinative. In the St. Patrick's Day Parade, no such showing of exclusivity exists.

In general, in like cases involving parades, the degree of exclusivity or diversity will be a factor to be considered. However, the fact that the organizers of a given parade open it to some does not necessarily mean that the state may require them to open it to all who express an interest in participating. Thus, we may envision a scenario, perhaps even in the St. Patrick's Day Parade, where exclusion would be appropriate. This would be determined, however, on a case-by-case basis. Where a parade organizer shows that its First Amendment interests take precedence, it will prevail on the second prong

of the *Roberts* test. Respondents simply have not made this showing here.

The final prong of the *Roberts* test requires examination of whether enforcement of the statute is the least restrictive alternative to satisfy the government's compelling interest. We disagree with the Administrative Law Judge's conclusion that allowing ILGO an alternative opportunity to march provides the organization with an equivalent forum. We are of the view that permitting ILGO the opportunity to march in the Parade is the only means of assuring its members full participation in the life of the community. As ILGO's witnesses compellingly testified, the group's members seek to "celebrate and affirm within their own community that they are lesbians and gay men of Irish descent." RDO, Finding of Fact 3, at 3 (*citing* T. 75-76, 157-158). "To march under an ILGO banner is to simply, with integrity, with honesty and pride, to celebrate who I am, as God has created me. That even means as a person who is Irish, who is gay, and who is Catholic" (T. 180). "We're Irish, and our place is among our people, to express our Irishness" (T. 157). The New York City St. Patrick's Day Parade is the premier Irish American celebration in this city, if not the country. RDO, Findings of Fact 7, 10, and 11, at 4 and 5. No alternative parade would substitute for participation in this Parade. To confine ILGO to a separate parade would be to deny its members full participation in the life of the community and to relegate them to "an undignified position behind the sweepers." *North Shore Right to Life v. Manhasset Am. Legion*, 452 F. Supp. 834, 839 (1978).

The Parade is a meeting of diverse groups — Catholics, non-Catholics, Irish, non-Irish — without regard to sex, race, color or creed to celebrate Irish heritage. Given the Parade's reach beyond the members of the Catholic Church and its inclusion of messages and people not related to Catholicism, it is a sufficiently secular event that inclusion of ILGO in the Parade, as the Parade is presently structured, does not implicate the Respondents' right to free exercise of reli-

gion. Some components of that celebration involve homage to the role of the Catholic Church in Irish history and culture. However, Respondents have created a celebratory vehicle that is sufficiently broad to encompass a wide range of participants, whether they endorse Catholic ideas or not.

Therefore, the Commission finds that Respondents have discrimatd against ILGO in violation of Code Sections 8-107(2) NS 8-108.1.

## REMEDY

This Commission is empowered to order legal and equitable relief designed to give force and effect to its order, and effectuate the purposes of the Human Rights Law. Code Section 8-109(2)(c); *e.g., Padilla v. Demetriou*, NYCCHR Compl. No. 135085, Decision and Order (Aug. 31, 1992); *Hageb v. Impeduglia*, NYCCHR Compl. No. H-92-0111, Decision and Order (June 10, 1992). The record establishes that Respondents' criteria for determining whether and when groups are admitted to the Parade are imprecise and "resist simple description." RDO, Findings of Fact 20 and 21, at 8. While Respondents do have a "waiting list," the evidence suggests that they do not strictly adhere to it. Groups have been admitted to the Parade without first being placed on the waiting list or being required to wait until they reached its head (T. 319-320, 324, 468-471). We find that under the circumstances, the appropriate remedy is to order Respondents to offer ILGO admission to the next St. Patrick's Day Parade held in New York City.

## ORDER

IT IS HEREBY ORDERED THAT:

1. Respondents cease and desist from engaging in discriminatory practices prohibited by the New York City Human Rights Law.

2. Respondents offer ILGO an opportunity to march in the next St. Patrick's Day Parade subject to the same terms and conditions applied to all Parade participants.

Dated: New York, New York
October 27, 1992

SO ORDERED.
COMMISSION ON
HUMAN RIGHTS

_____
EDWARD MA, Commissioner

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EDWARD MAPP, Commissioner

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HARILYN ROUSSO, Commissioner